

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1969

No. 305

UNITED STATES OF AMERICA

—v.—

JOHN HEFFRON SISSON, JR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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**CRIMINAL DOCKET  
UNITED STATES DISTRICT COURT**

**CR68-237-W**

**THE UNITED STATES**

*vs.*

**JOHN HEFFRON SISSON, JR.**

50 Appendix, USC 462—Military Selective Service Act, did fail to submit for induction (one count)

**Docket Entries**

**DATE**

**1968**

- Sept 27 Indictment returned
- Oct 7 WYZANSKI, CH.J. Appearance of John G.S. Flym for defendant, filed. Arraigned; pleads not guilty; October 14, 1968, file motions and inform Court if want jury trial. Released on personal recognizance.
- 21 Defendant's motion for discovery and inspection, filed. c/s
- 21 Defendant's motion to Dismiss Indictment, filed. c/s
- 21 Memorandum of points and authorities in support of motion to dismiss indictment filed.
- Nov 4 WYZANSKI, CH.J. Hearing on defendant's motion to dismiss and motion for discovery; certain points agreed upon—further hearing scheduled for Monday 11/18/68 at 2PM.
- 20 Stenographic transcript of proceedings on November 4, 1968, filed.

## DATE

1968

- Nov 25 Defendant's supplemental memorandum in support of his motion to dismiss, filed. c/s
- 25 Government's memorandum of Law, filed. c/s
- 25 WYZANSKI, CH.J. OPINION, filed.  
 "... Because defendant Sisson seeks an adjudication of what is a positical question, his motion to dismiss the intictment is denied." Copy to Messrs Wall, Flym, West.
- 26 WYZANSKI, CH.J. OPINION, filed.  
 "... The motion to dismiss the indictment is again denied." Copy to Messrs Wall, Flym
- Dec 3 WYZANSKI, Ch.J. ORDER entered: "This formal and binding order is a response to deft's counsel's informal letter dated November 27, 1968. The Court declines to modify its opinion of November 26 ...." Copy to Messrs Wall, Flym, and to WEST PUBLISHING.
- 11 WYZANSKI, CH.J. OPINION, filed.  
 "... In this case defendant is seeking, by tendering Professors Falk and Hoffman as witnesses, to broaden the defenses available in a trial which has constitutional implications. He seeks precisely the same latitude that in the 18th Century Erskine and Fox did in libel law. But if any such latitudinarian position is to be taken, it surely first should be sanctioned by the Supreme Court of the United States and not introduced in to law by a district judge."  
 Copy to Messrs Flym, Wall, West Pub.

1969

- Jan 23 Motion for amendment to include statement prescribed by 28 USC 1292 (b) in certain opinions and an order denying defendant's motion to dismiss, filed. c/s

# DATE

1969

Feb 5 WYZANSKI, CH.J. Motion for amendment to include statement, etc., denied.

Mar 14 See below

Mar 17 Appearance of Stanislaw R.J. Suchecki, Esq., for United States of America, filed.

14 WYZANSKI, CH.J. Pretrial hearing on question of possible defenses to be raised by defendant at his trial—trial scheduled for March 17, 1969 postponed to Friday March 21, 1969.

21 WYZANSKI, CH.J. Defendant set to the bar to be tried: defendant's request for voir dire of jurors and defendant's request filed. Jury empaneled, Robert Weiser (F); Court conducts interrogation of jurors; foreman sworn; balance of panel sworn; government open evidence; government rests; defendant begins; evidence; jury excused for conference at bench; jury returns to box; evidence; defense rests; oral motion for judgment of acquittal denied; arguments; CHARGE; committed at 4:20 PM; jury returns at 4:40 PM with verdict of guilty; jury polled at request of defendant; verdict is recorded; jury discharged.

26 Defendant's motion in arrest of judgment, filed c/s

28 Defendant's amended motion in arrest of judgment filed. c/s

Apr 1 WYZANSKI, CH.J. Defendant with his counsel and Government counsel present; Court reads its Opinion granting defendant's motion in arrest of judgment, pursuant to Rule 34 of Federal Rules of Criminal Procedure; excerpts quoted below: "In the words of Rule 34, the indictment of Sisson 'does not charge an offense'."

"This court's decision arresting a judgment of conviction for insufficiency of the indictment..."

DATE

1969

Apr 1—  
(Cont.)

is based upon the invalidity . . . of the statute upon which the indictment is founded' within the meaning of those phrases as used in 18 U.S.C. Section 3731. *U.S. v. Green*, 350 U.S. 415 (1965); *U.S. v. Bramblett*, 348 U.S. 503 504 (1955). Therefore, 'an appeal may be taken by and on behalf of the United States . . . direct to the Supreme Court of the United States.'

"TO GUARD AGAINST MISUNDERSTANDING, THIS COURT HAS NOT RULED THAT:

- "(1) THE GOVERNMENT HAS NO RIGHT TO CONDUCT VIETNAM OPERATIONS; OR
- (2) THE GOVERNMENT IS USING UNLAWFUL METHODS IN VIETNAM; OR
- (3) THE GOVERNMENT HAS NO POWER TO CONSCRIPT THE GENERALITY OF MEN FOR COMBAT SERVICE; OR
- (4) THE GOVERNMENT IN A DEFENSE OF THE HOMELAND HAS NO POWER TO CONSCRIPT FOR COMBAT SERVICE ANYONE IT SEES FIT; OR
- (5) THE GOVERNMENT HAS NO POWER TO CONSCRIPT CONSCIENTIOUS OBJECTORS FOR NONCOMBAT SERVICE."

"INDEED THE COURT ASSUMES WITHOUT DECIDING THAT EACH ONE OF THOSE PROPOSITIONS STATES THE EXACT REVERSE OF THE LAW."

"ALL THAT THIS COURT DECIDES IS THAT AS A SINCERE CONSCIENTIOUS OBJECTOR SISON CANNOT CONSTITUTIONALLY BE SUBJECTED TO MILITARY ORDERS (NOT REVIEWABLE IN A UNITED STATES CONSTITUTIONAL COURT), WHICH MAY REQUIRE

## DATE

1969

- Apr 1—HIM TO KILL IN THE VIETNAM CONFLICT.”  
(Cont.) Court orders this decision and this court’s order granting defendant SISSON’S motion in arrest of judgment entered forthwith.
- Apr 3 Defendant’s amendment to amended motion in arrest of judgment, filed. c/s
- 3 WYZANSKI, CH.J. Re: amended motion to arrest of judgment filed this day, “motion granted NUNC PRO TUNC as of 1 April, C.E. Wyzanski, Jr. 3 April 1969 4 P.M.”
- 9 Stenographic transcript of proceedings before Judge Wyzanski on March 21, 1969, filed.
- 23 Govt’s notice of appeal filed. Copy to John G.S. Flym, Esq.
- May 2 Statement of docket entries sent to the Supreme Court.
-



UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

INDICTMENT

The grand jury charges:

That on or about April 17, 1968, at Boston, in the District of Massachusetts, JOHN HEFFRON SISSON, JR., of Lincoln, in the District of Massachusetts, did unlawfully, knowingly and wilfully fail and neglect and refuse to perform a duty required of him under and in the execution of the Military Selective Service Act of 1967 and the rules, regulations and directions duly made pursuant thereto, particularly 32 Code of Federal Regulations 1632.14, in that he did fail and neglect and refuse to comply with an order of his local draft board to submit to induction into the armed forces of the United States; in violation of Title 50, Appendix, United States Code, Section 462.



UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

*Defendant's Motion for Discovery  
and Inspection*

Pursuant to Rule 16(b) of the Federal Rules of Criminal Procedure, defendant moves that this Court order the attorney for the government to permit the defendant to inspect and copy or photograph the following books, papers and documents which are within the possession, custody or control of the government:

1. The Local Board Actions and Minutes (hereinafter referred to as SSS Form No. 112) for any meeting of Local Board No. 114 held on or about November 20, 1967 at which defendant was reclassified 1-A.
2. The SSS Form No. 112 for any meeting of Local Board No. 114 held on or about March 18, 1968, at which time an Order to Report for Induction (SSS Form No. 252) was prepared for defendant.
3. Any and all other SSS Forms No. 112 for any and all meetings of Local Board No. 114, held at any time from November 20, 1967 through March 18, 1968, if at said meeting or meetings said Local Board considered and/or decided any matter directed specifically to the defendant or the defendant's selective service classification.
4. Any and all correspondence from Local Board No. 114 notifying, and/or providing instructions to, defendant about the meetings referred to in items 1, 2 and 3 above.

5. The Classification Records (SSS Form No. 102) for all registrants of Local Board No. 114 born during the years 1942, 1943, 1944, 1945 and 1946, inclusive.

6. The Record of Delinquents (SSS Form No. 302) in effect on the date of defendant's Order to Report for Induction on or about March 18, 1968.

7. The Notice of Call on State (SSS Form No. 200) and the Notice of Call on Local Board No. 114 (SSS Form No. 201) in effect on or about March 18, 1968.

8. The papers or documents which provide the following information with respect to each member of Local Board No. 114:

- a. Name
- b. Address
- c. Age
- d. Date of appointment to Local Board No. 114
- e. Military status, including reserve or retired status
- f. Citizenship

9. A complete set of the so-called "Local Board Memorandums" issued by the Director of Selective Service which were in effect on or about March 18, 1968.

10. The set of Forms in effect on or about March 18, 1968.

The books, documents and records described above are material to the preparation of defendant's defense:

A. The records sought in items 1, 2 and 3, which are required to be kept by 32 C.F.R. § 1604.58, are material to ascertain the propriety of actions affecting the defendant taken by Local Board No. 114, for instance whether said actions are in accordance with the provisions of 32 C.F.R. Parts 1632 and 1623. See e.g. *Brede v. United States*, 396 F.2d 155 (9th Cir. 1968); *United States v. Walsh*, 279 F. Supp. 115 (D. Mass. 1968).

B. The records sought in Item 4 are material to ascertain whether the requirements of due process have been met. See e.g. *United States v. Thompson*, Cr. No. 66-309-W (D. Mass. Dec. 4, 1967)..

C. The records sought in items 5, 6 and 7, which are required to be kept by 32 C.F.R. §§ 1621.6; 1642.44; 1631.6 and 1631.7, are material to ascertain the propriety of the timing of defendant's Order to Report for Induction. See e.g. *United States v. Lybrand*, 279 F. Supp. 74 (E.D.N.Y. 1967).

D. The records sought in item 8 are material to ascertain whether the members of Local Board No. 114 meet the qualifications prescribed by 32 C.F.R. § 1604.52.

E. The records sought in items 9 and 10 include instructions issued to all Local Boards by the Director of Selective Service pursuant to 32 C.F.R. § 1604.1(b) and Forms which by 32 C.F.R. § 1606.51 are made part of the selective service regulations. These records are not printed in the Federal Register but are required to be available for inspection and copying under Title 5 U.S.C. § 552.

Respectfully submitted,

/s/ John G. S. Flym  
JOHN G. S. FLYM  
Attorney for Defendant

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

*Motion to Dismiss Indictment*

Pursuant to Rule 12 of the Federal Rules of Criminal Procedure, defendant moves this Court to dismiss the indictment returned against him on the ground that his refusal to submit to induction into the armed forces was justified because:

1. the government's military involvement in Vietnam violates international law.
2. he reasonably believed the government's military involvement in Vietnam to be illegal.
3. the Military Selective Service Act of 1967, Title 50 App. U.S.C. §§ 451 et seq., and the regulations adopted pursuant thereto, violate the Constitution of the United States.

The defendant requests a hearing on this motion.

Respectfully submitted,

/s/ John G. S. Flym  
JOHN G. S. FLYM  
Attorney for Defendant

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION TO DISMISS INDICTMENT

1. *The Government's Military Involvement in Viet Nam Violates International Law.*

The illegality of the United States military involvement in the Viet Nam conflict is discussed in part 2 C, D and E of this memorandum.

That the legality of this involvement is a justiciable issue cannot be doubted. The "Government of the United States has been emphatically termed a government of laws, and not of men". *Marbury v. Madison* 1 Cr. 137, (1803).

In the landmark decision of *Ex Parte Milligan*, 4 Wall 2 (1866) the Supreme Court held that governmental acts must comply with the constitution; not only in time of peace, but also during war time:

*"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."* 71 U.S. at 120, 121. (Emphasis added).

In particular, the "war power" and considerations of "national defense" are no less subject to constitutional limits than any of the other powers and duties conferred



upon the President. As the Court held in *United States v. Robel*, U.S. , , 19 L. ed 2d 508, 514 (1967):

"However, the phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power, which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 . . . this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. *Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart.* For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. *It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . .*" (Emphasis added).

This principle of the dominance of law over the exercise of power has been articulated on numerous occasions by the Supreme Court, *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146:

" . . . the war power of the United States, like its other powers and like the police power of the states, is subject to applicable Constitutional limitations. (Ex parte *Milligan*, 4 Wall 2, 121-127; *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 336; *United States v. Joint Traffic Assn.*, 171 U.S. 505, 571; *McCray v. United States*, 195 U.S. 27, 61; *United States v. Cress*, 243 U.S. 316, 326)." 251 U.S. at 156.

One dramatic instance when the executive war power clashed with, and was declared subject to, constitutional limitations occurred in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1951). With the possibility of a steel strike, President Truman issued an executive

order directing the Secretary of Commerce to take possession of the steel mills because a strike would imperil the national defense when American armed forces were fighting in Korea. The Court held that the seizure order could be sustained neither,

"... as an exercise of the President's military power as Commander in Chief of the Armed Forces [n]or ... because of the several constitutional provisions that grant executive power to the President". 343 U.S. at 587.

In a concurring opinion, Mr. Justice Jackson elaborated:

"What the power of command may include, I do not try to envision, but I think it is *not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.*" 343 U.S. at 646.

Also writing a separate concurring opinion, Mr. Justice Frankfurter underlined the importance of judicial intervention:

"The judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government." 343 U.S. at 603.

The seizure of defendant, no less than the seizure of the steel plants, is protected by the "due process" clause of the Fifth Amendment.

The refusal of the United States Supreme Court to grant certiorari in *Mitchell v. United States*, 386 U.S. 972 (1967), of course does not preclude this Court from judging the legality of the government's involvement in Viet Nam under international and domestic law. As Mr. Justice Douglas said in his dissent in the *Mitchell* case, *supra*:

"There is a considerable body of opinion that our action in Vietnam constitutes the waging of an aggressive 'war'".



Mr. Justice Douglas quoted Mr. Justice Jackson, United States Prosecutor at Nuremburg, as saying:

"If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us." (International Conference on Military Trials, Depart. State Pub. No. 3880, p. 330).

More recently, in *Mora v. McNamara*, U.S. 19 L. ed 2d 287 (1967), Mr. Justice Douglas again dissented, this time joined by Mr. Justice Stewart, from the Court's denial of a petition for writ of certiorari. Mr. Justice Douglas explained the function of the judiciary in cases of this nature in simple, straight-forward language:

"We do not, of course, sit as a committee of oversight or supervision. What resolutions the President asks and what the Congress provides are not our concern. With respect to the Federal Government, *we sit only to decide* actual cases or controversies within judicial cognizance that arise as a result of *what the Congress or the President or a judge does or attempts to do to a person or his property.*" 19 L. ed 2d at 290. (Emphasis added).

It follows that the government cannot deprive defendant of his liberty, consistent with the dictates of due process, unless it submits the legality of its military involvement in Viet Nam to the judgment of this Court.

Nor can the government object that defendant lacks standing to request an adjudication of this issue. As the Supreme Court held in *Flast v. Cohen*, U.S. 20 L. ed. 2d 947, (1968):

"The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the contro-

versy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204, 7 L ed. 2d 663, 82 S Ct. 691 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." 20 L ed. 2d at 961.

Clearly, defendant has a personal stake in the outcome of the controversy.

As will be shown in part 2 C, D and E of this memorandum, the government's military involvement in Viet Nam violates both international and domestic law.

**2. Defendant Reasonably Believed That The Government's Military Involvement in Viet Nam is Illegal.**

**A. Defendant believed the government's military involvement in Viet Nam to be illegal.**

Attached hereto as "Exhibit 1" is an affidavit wherein defendant states in part that, at the time he refused to submit to induction, he believed the government's military involvement in Viet Nam to be illegal.

**B. The government recently conceded that a reasonable man could hold the view that the United States involvement in Viet Nam is illegal.**

Attached hereto as "Exhibit 2" is the affidavit of William M. Kunstler, chief defense counsel in the case of *United States v. Berrigan*, Cr. No. 28, 111 (D. Md. October, 1968). Attached to said affidavit is a transcript of a colloquy between the Court and counsel for the government which states in pertinent part:

"MR. MURPHY: No. Your Honor. We say that a reasonable man could have his views.

THE COURT: All right. Then I take it that the Government is not contending that his views that the war is illegal are so unreasonable that a reasonable man would not have them."

The government should not be permitted to adopt inconsistent positions with respect to a question of fact common to actions initiated by the government throughout the United States.\*

C. *Twelve experts concur that the government's military involvement in Viet Nam violates international law.*

Submitted as Exhibit 3 to this memorandum is a copy of the book *Viet Nam and International Law*, subtitled

\* The determination in the *Berrigan* case, *supra*, should bind the government in the instant case. For as the Supreme Court of California, Traynor, J., held in *Bernhardt v. Bank of America*, 19 Cal. 2d 807 (1942):

"Just why a party who was not bound by a previous action should be precluded from asserting it as a *res judicata* against a party who was bound by it is difficult to comprehend. (See 7 Bentham's Works (Bowring's ed.) 171.) Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of *res judicata* is asserted. *Coca Cola Co. v. Pepsi Cola Co.*, *supra* *Liberty Mutual Ins. Co. v. George Colon & Co.*, 260 N.Y. 305, 183 N.E. 506; *Atkinson v. White*, 60 Me. 396; *Eagle, etc., Ins. Co. v. Heller*, 149 Va. 82, 140 S.E. 314, 57 A.L.R. 490; *Jenkins v. Atlantic Coast Line R. Co.*, 89 S.C. 408, 71 S.E. 1010; *United States v. Wexler*, 8 F. 2d 880. See *Good Health Diary Food Products Corp. v. Emery*, 275 N.Y. 14, 9 N.E. 2d 758, 112 A.L.R. 401. The commentators are almost unanimously in accord. 35 Yale J.J. 607; 9 Va. L. Reg., N.S., 241; 29 Ill. L. Rev. 93; 18 N.Y.U.L.Q.R. 565, 570; 12 Corn. L.Q. 92."

There can be no question of privity here: the government which is proceeding against defendant here is the same government which prosecuted Berrigan. As the said Exhibit 2 shows, the Court in *Berrigan* advised the government,

"We will be here and let people read all of these books, if you are going to contest the reasonableness of his views."

The government chose not to expose the jury to the specific book offered by defense counsel (*Viet Nam and International Law*) or to other literature and expert and lay testimony bearing on the legality issue. The government should be bound by that choice.

"The Illegality of United States Military Involvement", (O'Hare Books, 1967). This book was sponsored by the Lawyers Committee on American Policy toward Vietnam, and was written by and in consultation with the following experts on international law:

RICHARD A. FALK Milbank Professor of International Law, Princeton University.

RICHARD J. BARNET Co-Director, Institute for Policy Studies, Washington, D. C.

JOHN H. E. FRIED Professor of Political Science, City University of N. Y. (City College).

JOHN H. HERZ Professor of International Relations, City University of N. Y. (City College).

STANLEY HOFFMAN Professor of Government and International Law, Harvard University.

WALLACE McCLURE Lecturer on International Law, Universities of Virginia, Duke, Dacca, Karachi.

SAUL H. MENDLOVITZ Professor of International Law, Rutgers University School of Law.

RICHARD S. MILLER Professor International Law, Ohio State University College of Law.

HANS J. MORGENTHAU Albert A. Michelson Distinguished Service Professor Political Science and Modern History, University of Chicago.

WILLIAM G. RICE Professor of International Law, University of Wisconsin Law School.

BURNS H. WESTON Professor of International Law, University of Iowa, College of Law.

QUINCY WRIGHT Professor Emeritus of International Law, University of Chicago.

These eminent men of the law draw the following conclusions:

"The policy of the United States in Vietnam has been to use military force in violation of the Geneva Accords of 1954, the United Nations Charter of 1945, the Kellogg-Briand Pact of 1928 and several rules

of general international law. In the pursuit of this policy, the United States has ever more openly claimed for itself and the Saigon regime the right to consider the Geneva Accords of 1954, which regulate the internal and international position of the whole of Vietnam, as non-binding, while at the same time insisting that the other side is bound.

In particular, the following salient points emerge:

1. "The United States claim to be acting in "collective self-defense" on behalf of South Vietnam is contrary to the well-established meaning of the rule laid down in Article 51 of the United Nations Charter to define the situations in which the right of collective self-defense may be lawfully exercised.

2. The United States military intervention in Vietnam therefore also violates the fundamental prohibition of the use of force proclaimed in Article 2(4) of the Charter as a Principle of the United Nations.

3. The United States has refused for more than a decade to abide by the basic Charter obligation contained in Article 33(1) to seek the settlement of international disputes by peaceful means.

4. The United States has refused to make proper use of the elaborate machinery created by the Geneva Accords of 1954 for the purpose of preventing any improper developments in Vietnam. The United States, furthermore, abetted and supported the systematic disregard of these obligations by the Saigon regime.

5. The State Department contends that an armed attack by North Vietnam upon South Vietnam occurred before February 7, 1965, the date on which the United States started overt war actions. This contention itself implies that the use of force by the United States in Vietnam during the four-year period between 1961 and early 1965 was illegal. The State Department agrees with the position of this analysis that armed attack must have taken place to justify the use of force by the United States under the principle of 'collective self-defense.'



6. In February 1965, when the United States started war actions against North Vietnam, the United States formally declared that these war actions constituted reprisals. Under the rules of international law governing the right of reprisal, these war actions must be regarded as illegal reprisals.

7. The United States abetted the breach of the central provision of the Geneva Accords of 1954 by South Vietnam, namely, the obligation to hold nationwide elections under international supervision looking toward the reunification of the Southern and Northern zones of Vietnam under a single government.

8. The United States also contravened other basic provisions of the Geneva Accords of 1954 by fostering a foreign military build-up in Vietnam and by virtually bringing South Vietnam into a military alliance.

9. The presence of large United States military forces in South Vietnam and the introduction of military equipment into South Vietnam has violated those provisions of the Geneva Accords which prohibit any foreign military build-up in South Vietnam. This conclusion has been confirmed by findings of the ICC.

10. The war actions of the United States in South Vietnam are not authorized by the SEATO Treaty but, in fact, appear to be in violation of it.

11. Even if the United States were legally entitled to take war actions in Vietnam, its methods of warfare would still be illegal insofar as they have violated the rules and customs of warfare."

*D. The government's military involvement in Vietnam has consistently violated the rules of warfare.*

Submitted as Exhibit 4 to this memorandum is a book entitled *In The Name of America*, (E. P. Dutton & Co., Inc., 1968). This book was sponsored by the Clergy and Laymen Concerned About Vietnam.

The introductory paragraph to this book sets forth a devastating indictment of the government's military involvement in Viet Nam:

"The news dispatches that follow do not make pleasant reading. Their cumulative effect is overpowering, for they do not merely confirm what we all know, that the war in Vietnam is dirty and inhumane, but they also establish something few of us have known, that American conduct in Vietnam has been characterized by consistent violation of almost every international agreement relating to the rules of warfare. All war is hell: this has been used as an argument to justify any means to achieve victory as well as an argument for the condemnation of all war; but so long as men have fought they have sought to establish rules and to set limits beyond which, by common consent, decent men will not go. If there are such offenses as 'crimes against humanity,' as the United States tried to demonstrate after World War II, then American conduct in Vietnam is condemned by those standards of conduct which we imposed on a defeated enemy in the Nuremburg Trials. When we measure American actions in Vietnam against the minimal standards of constraint established by the Hague Convention of 1907 and the Geneva Conventions of 1929 and 1949, our nation must be judged guilty of having broken almost every established agreement for standards of human decency in time of war.:

Twenty-nine eminent spiritual leaders from across the land signed the above commentary:

Bishop Ralph T. Alton  
Madison, Wisconsin

Dr. John C. Bennett,  
President,  
Union Theological Seminary

Dr. Robert McAfee Brown,  
Professor,  
Stanford University

Bishop William Crittenden  
Diocese of Erie, Pennsylvania

Dr. Harvey G. Cox,  
Professor,  
Divinity School  
Harvard University

Dr. Edwin T. Dahlberg,  
Former President,  
National Council of Churches



Dr. Truman Douglass,  
Executive Vice President,  
Board of Homeland Ministries  
of The United Church of Christ

Father Robert Drinan,  
Dean,  
Boston College Law School

Dr. Joseph Fletcher,  
Professor,  
Episcopal Theological Seminary

Rabbi Roland Gittelsohn  
Temple Israel  
Boston, Massachusetts

Bishop Charles F. Golden  
Nashville, Tennessee

Rev. Dana McLean Greeley,  
President, Unitarian  
Universalist Association

Rabbi Abraham Heschel,  
Professor,  
Jewish Theological Seminary

Bishop Fred Holloway  
Charleston, West Virginia

Rabbi Wolfe Kelman,  
Professor,  
Jewish Theological Seminary

Dr. Martin Luther King, Jr.  
President, Southern Christian  
Leadership Conference

Rabbi Arthur Lelyveld,  
President,  
American Jewish Congress

Rabbi Albert Lewis  
Temple Isaiah  
Los Angeles, California

Bishop John Wesley Lord  
Washington, D. C.

Dr. Martin Marty,  
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*E. The government's military involvement in Viet Nam violates domestic law.*

In a recent analysis of the legality of the government's military involvement in Viet Nam, the conservative Harvard Law Review concluded as follows:

"Under the analysis in this note the validity of the President's actions in Vietnam depends on whether or not specific congressional approval has been secured for the war which has developed. The action is not a response to an attack on or a declaration of war against the United States. In terms of troop commitment and casualties—which now exceed those of the Korean War—the conflict, excluding the Civil War, has become the third largest in American history: it is 'war' within the meaning of article I, section 8. Current treaty agreements, in particular the SEATO Treaty, do not purport to serve as authorization for such a war. Such authorization, if it has been secured, must be found in the Gulf of Tonkin Resolution . . . At best, the Gulf of Tonkin Resolution, even coupled with subsequent appropriations, leaves unclear the extent to which congressional authorization of the war has been expressed." (Emphasis added).

Note, *Congress, The President, and the Power to Commit Forces to Combat*, 81 Harv. L. Rev. 1771, 1805 (1968).

Thus, the so-called "Gulf of Tonkin Resolution" appears to be the only basis for the legitimacy of the government's military involvement in Viet Nam under the Constitution of the United States. The unreliability of the Gulf of Tonkin Resolution, and the consequent illegitimacy of the government's use of power in Viet Nam, is exposed in an article by I. F. Stone, "McNamara and Tonkin Bay: The Unanswered Questions", *New York Review of Books*, March 28, 1968, p. 5 et seq., where he analyzes the Hearing Before the Committee on Foreign Relations, United States Senate, Ninetieth Congress, Second Session, with the Honorable Robert S. McNamara, Secretary of Defense, on February 20, 1968.

In any event, the statement by the Honorable Paul G. Findley, Member of Congress, presented to the Committee on Foreign Relations of the United States Senate on August 23, 1967, shows that the Gulf of Tonkin Resolution related only to an armed attack on United States ships. It does not relate to any armed attack upon South Viet Nam, which is the principal basis for the govern-

ment's military involvement in Viet Nam. As Representative Findley concludes, the government's involvement violates the SEATO Treaty. (A part of the statement by Representative Findley is reproduced in Appendix VII to the said Exhibit 3, pages 155, 156.)

Manifestly, it can not be supposed that Congress authorized the violation of the SEATO Treaty or of any other applicable provision of international law.

*F. The conclusion that the government's military involvement in Viet Nam is illegal has been widely, and vocally, accepted by leaders in all sectors of the nation.*

(1) Martin Luther King, winner of the Nobel Prize for Peace, in *Speeches by the Rev. Dr. M. L. King About the War in Vietnam* (N.Y., 1968), said in his speech "Vietnam is Upon Us", given on February 6, 1968 in Washington, D. C.:

"Nothing convinces me more that we suffer this moral and spiritual lag than our participation as a nation in the war in Vietnam. Our involvement in this cruel, senseless, unjust war is a tragic expression of the spiritual lag of Americans."

(2) Representative Stephen Young (D. Ohio), accuses the United States of violating the Geneva Convention with respect to the treatment of prisoners of war. Congressional Record-Senate July 20, 1966, 15638.

(3) Senator George McGovern (D.-S. Dakota), accuses the United States of "devastating" Vietnam and "ravishing the people whose freedom we would protect". N. Y. Times, April 26, 1967, p. 9.

(4) Senator Wayne Morse (D. Oregon), former dean of University of Oregon Law School, states that the United Nation Charter and the Geneva Agreement of 1954 "make the Vietnam war illegal". Philadelphia Inquirer, April 27, 1964.

(5) Mr. Donald Luce, Director of International Voluntary Services, a voluntary aid agency in Viet Nam supported partly by government funds, resigned in protest to the war. As reasons for his resignation, he cites the destruction of family life, the large numbers of civilian casualties caused by bombing, and the "destruction" of the Vietnamese people. *New York Times*, September 20, 1967.

(6) D. F. Fleming, Emeritus Professor of International Relations, Vanderbilt U., speaks of the Vietnam war as "a tragic moral failure in our national experience", in which the United States is "surpassing the worst days of European colonialism". D. F. Fleming, "Vietnam and After", *The Western Political Quarterly*, Vol. XXI, No. 1, March, 1968, pp. 141 ff.

(7) In "Just a Drop Can Kill", Secret work on Gas and Germ Warfare", *The New Republic*, May 6, 1967, p. 11-15, Seymour Hersh describes research on chemical and gas warfare, and some of the uses being made of chemicals and gas by the government in Vietnam.

(8) James A. Joyce accuses the United States of deliberate bombing of civilians in North Vietnam, "Bombing of Civilians: The Red Cross Stand", *Christian Century*, April 12, 1967.

(9) *The Nation*, May 15, 1967 comments editorially that the accusation that Americans are "the Nazis of today" contains a "shocking component of truth". The editorial says, "Called on to support an universal war, many Americans refuse to respond with the traditional patriotic tropisms. May their numbers increase!"

(10) Dr. Robert Novak, professor of religion, Stanford University, argues that in light of the destruction of Vietnam, there can be no justification of the war. *Vietnam, Crisis of Conscience*, Novak, Heschel, Brown (New York, 1967) p. 47. In the same book, Rabbi Abraham Hirschel, professor of Ethics and

Mysticism, Jewish Theological Seminary, contends that the conscience of the United States has become "a fossil", and says that he is "horrified by the atrocities of this war", pp. 56-59; and Robert McAfee Brown, Professor of Religion at Stanford, says that the Vietnamese War contradicts the fundamental propositions that God is the Father of all men and that God has implanted His image in all men, p. 87.

(11) John K. Galbraith, former United States Ambassador to India, professor of Economics at Harvard: "But I would judge . . . that the chance to persuade the people on the merits of the Vietnam war is now irrevocably lost. If so, it is now a war that we cannot win, *should not wish to win*, are not winning, and which our people do not support". J. K. Galbraith, *How To Get Out of Vietnam* (New York, 1967) p. 31 f.

The following books lend further support to the indictment of the Viet Nam war:

(12) Howard Zinn, *Vietnam: The Logic of Withdrawal*, (Boston, 1967), particularly pp. 56-82.

(13) Theodore Draper, *The Abuse of Power*, New York: Viking, 1967.

(14) Richard A. Falk (ed.), *The Vietnam War and International Law*, Princeton University Press, 1968.

(15) Felix Greene, *Vietnam! Vietnam! Photographs and Text*, Palo Alto, Calif. Fulton, 1966.

(16) David Halberstam, *The Making of A Quagmire*, Random House, 1965.

(17) Edward S. Herman and Richard B. DuBoff, *America's Vietnam Policy: The Strategy of Deception*, Washington, D.C., Public Affairs Press, 1966.

(18) Staughton Lynd, *The Other Side*, New American Library, 1967.

(19) Mary McCarthy: *Vietnam*, Harcourt, Brace & World, 1967.



(20) Hans Morgenthau, *Vietnam and the United States*, Public Affairs Press, 1965.

(21) Marcus G. Raskin and Bernard B. Fall (ed.), *The Vietnam Reader*, New York: Random House, 1965.

(22) Harrison Salisbury, *Behind The Lines-Hanoi: December 23, 1966-January 7, 1967*, New York: Harper & Row, 1967.

(23) Franz Schurman, et al., *The Politics of Escalation in Vietnam*, Beacon Press, 1966.

(24) In the book *Authors Take Sides on Vietnam*, Bagguley, eds., 1967, the following authors, among many others, condemn the illegality of American involvement in Vietnam:

- A. S. Ayer, Philosopher, p. 18;
- Robert Bolt, Playwright, p. 22;
- Graham Greene, Novelist, p. 37;
- Walter Kaufman, Philosopher, p. 44;
- Denise Levertov, Poetess, p. 46;
- Herbert Marcuse, Philosopher, p. 50;
- Lewis Mumford, Sociologist, p. 55;
- C. P. Snow, Novelist, p. 69;
- Stephen Spender, Poet and Journalist, p. 70;
- George Steiner, Critic, p. 71; and
- Barbara Tuchman, Historian, p. 72.

In particular, Bertrand Russell, states

"Atrocity has characterized the conduct of the war throughout its history . . . I regard the policy-makers in Washington who preside over both the aggression and the atrocity to be war criminals in the precise sense laid down by the Nuremberg Trials."

(25) Jean-Paul Sartre, *New York Times*, May 3, 1967 stated that, in the judgment of the War Crimes Tribunal, of which he was the executive president, the United States government was guilty of aggression and "widespread, systematic and deliberate" bombardment of civilian targets in Vietnam.

3. *The Defendant's Reasonable Belief that the Government's Military Involvement in Viet Nam is Illegal Justifies His Refusal to Submit to Induction Into the Armed Forces.*

A. *Under traditional criminal law concepts of justification, the defendant's reasonable belief that the Viet Nam war is illegal entitles him to have the indictment dismissed.*

It requires no argument that if the government's military involvement in Viet Nam is indeed illegal, the attempt to conscript defendant into the armed forces, against his will, is also illegal.\* As clearly appears from the *Marshall Report of the National Advisory Commission on Selective Service*, U. S. Govt. Print Off. 1967, were it not for the military involvement in Viet Nam, defendant would not be faced with conscription into the armed forces:

"Volunteers have contributed two-thirds of the military force since 1950. With limited exceptions, the Navy, Marines and Air Force have used volunteers almost entirely. And in periods of relative quiet, when draft calls have been low, most of the entrants into the Army itself have been volunteers".

In short, virtually all draftees are inducted into the Army, but in time of peace, the Army is able to recruit a sufficient number of enlisted personnel.

However, defendant's reasonable belief that the war is illegal, in and of itself, absolves him of criminal responsibility under traditional concepts of justification of acts otherwise criminal.

In the first instance, defendant's reasonable belief negates the requisite criminal intent. Stated differently,

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\* Beyond this basic point, if the judiciary declines—for whatever good and sufficient reasons—to adjudicate the legality of United States participation in the Viet Nam conflict, then again defendant should be absolved of criminal liability for refusing to permit a taking of his liberty which, by assumption, lacks the constitutional safeguard of due process, if he hold the belief that the war (and therefore the taking) is illegal.



there is no duty to obey an illegal command, nor one reasonably believed to be illegal. The principle is usually applied with respect to justification of affirmative acts, rather than, as here, justification of refusal to act. E.g. *U.S. v. Ashton*, 2 Sumn. 13, F. Cas. No. 14,470 (C.C. Mass.). *State v. Jackson*, 71 N.H., 552. And such justification is customarily based, not on actuality of imminent danger, but on the reasonable apprehension thereof. *Harris v. State*, 96 Ala. 24 (1891); *Haines v. State*, 275 P. 2d 347 (Okl. Cr. 1954). Perkins, *Criminal Law* (1957), pp. 883-899. In short, necessity, of which one form is self-defense, (e.g. *People v. Maine*, 166 N.Y. 50 (1901); *State v. Abbott*, 36 N.J. 63 (1961)), constitutes justification:

*"If the necessity which leaves no alternative but the violation of the law to preserve life, be allowed as an excuse for committing what would otherwise be high treason, parricide, murder, or any other of the higher crimes, why should it not render venal an offense which is only malum prohibitum, and the commission of which is attended with no personal injury to another." The William Gray*, 29 Fed. Cas. 1300, No. 17, 694 (C.C.N.Y. 1810). (Emphasis added).

The reasoning of the Court in the above quotation from *The William Gray* decision illustrates that the notions of "criminal intent", "necessity", "self-defense" and so on, are merely different facets of the same principle. See e.g., Model Penal Code Tentative Draft No. 8 (1958), § 3.02.

In the present case, as Exhibit 1 to this memorandum shows, defendant believed (reasonably) the government's military involvement to be illegal, one aspect of such illegality being the violation of the Charter of the International Military Tribunal of Nuremberg, which is an integral part of the Treaty of London, August 8, 1945, 59 Stat. 1544, to which the United States is a signatory. The Charter of the Nuremberg Tribunal was unanimously affirmed by the General Assembly of the United Na-

tions on December 11, 1946. The United States took a leading role (together with France, Britain and the Soviet Union) in drafting the Nuremberg Charter. The pertinent provisions are as follows:

### Principle I

"Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment".

### Principle IV

"The fact that a person acted pursuant to order of a superior does not relieve him from responsibility provided a moral choice was in fact possible to him".

### Principle VI

"The crimes hereinafter set out are punishable as crimes under international law:

#### a. Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

#### b. War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

c. Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime."

Thus, participation (Principle VI a. (ii)) by defendant in a war which he believes to violate Principle VI a. (i) renders him liable to prosecution under Principles I and IV since a moral choice was open to him. Defendant made that moral decision.

The Nuremberg Charter is not simply part of the law of the United States by reason of its treaty status. It is declaratory of an international law which is independent of the Constitution. Thus, in refusing to participate in an illegal war, defendant was obeying the higher commands of the Constitution of the United States as well as those of an international law which governs the people of all the nations on earth.

As Mr. Justice Jackson, then United States prosecutor at Nuremberg, stated: "If certain acts . . . are crimes, they are crimes whether the United States does them or whether Germany does them."

*B. Defendant's inability to permit himself to be inducted, consistent with the dictates of his conscience and in light of his reasonable belief that the government's military participation in Viet Nam is illegal, entitles him to have the indictment dismissed.*

A citizen's right of conscience is protected by the Constitution of the United States. The right has been recognized as imbedded in the First Amendment, protection of free exercise of religion, ". . . according to the dictates of conscience . . .", *McGowan v. Maryland*, 366 U.S. 420 (1961). The right was also characterized in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) as,

"... the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

Particularly apt is the following declaration from the *Barnette* decision; *supra*:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." See also *Sherbert v. Verner*, 374 U.S. 398 (1963).

However, the right of conscience can as easily, and perhaps more appropriately, be founded on the Ninth Amendment. The history of that Amendment is briefly described in *Griswold v. Connecticut*, 381 U.S. 479 (1964) where the Court recognizes Madison as the chief author of the clause. Madison had, as one of his chief concerns, the protection of the right of conscience. See Brant, *Madison: On the Separation of Church and State*, William & Mary Quarterly, Series III, vol. 8, 1951.

The *Griswold* decision defines the scope of the Ninth Amendment as follows:

"In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the, traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental. *Snyder v. Massachusetts*, 291 U.S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . ." *Powell v. Alabama*, 287 U.S. 45." (Emphasis added).

Thus, the Court explicitly recognizes what Madison sought to achieve, namely that the "conscience of our people" is protected by the Ninth Amendment.

The right of conscience, in the context of objection to war, was articulated by late chief Justice Stone in *The Conscientious Objector*, 21 Col. U. Q., pp. 268, 269, Number 4, October 1919, as follows:

"Viewed in its practical aspects, however, there may be and probably is a *very radical distinction between compelling a citizen to refrain from acts which he regards as moral but which the majority of his fellow citizens and the law regard as immoral or unwholesome to the life of the state on the one hand, and compelling him on the other to do affirmative acts which he regards as unconscientious and immoral.* The action of the state in compelling the citizen to refrain from doing an act which he regards as moral and conscientious does not in most instances which are likely to occur do violence to his conscience; but conscience is violated if he is coerced into doing an act which is opposed to his deepest convictions of right and wrong . . . The ultimate test of the course of action which the state should adopt will of course be the test of its own self-preservation; but with this limitation, at least in those countries where the political theory obtains that the ultimate end of the state is the highest good of its citizens, *both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state.* So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process. *Every ethical and practical consideration which should lead the state to endeavor to avoid the violation of the conscience of its citizens should therefore lead a wise and humane government to*



seek some practical solution of this difficult problem." (Emphasis added).

It is no exaggeration, therefore, to consider as fundamental, and necessarily protected by the Ninth Amendment, the right of conscience to refuse to participate in a war reasonably believed to be illegal. Defendant's exercise of that right (see Exhibit 1, to this memorandum) is so protected.

4. *The Military Selective Service Act of 1967 is Unconstitutional and, Therefore, the Indictment Returned Against Defendant Should Be Dismissed.*

A. *The regulations adopted pursuant to the Military Selective Service Act do not afford defendant the protections required by due process.*

Prior to 1967, the regulations provided that a registrant whose request for classification as a conscientious objector was denied by his Local Board could obtain a hearing before a Justice Department officer. This Justice Department hearing was accompanied by an FBI investigation bearing on the registrant's sincerity. Denial of such a hearing voided a classification. *Sterrett v. United States*, 216 F. 2d 659. (9th Cir. 1954).

However, in 1967 the Act was amended to eliminate the provision for a Justice Department hearing, with the consequence that a registrant is presently afforded only one "appearance" before his local board where he lacks rights to counsel, to a transcript, or to present evidence. 32 C.F.R. §§ 1624.1-3 (1967). Coupled with the finality of the local board's determination, which is subject to judicial review only to ascertain whether the determination has a "basis in fact", *Estep v. United States*, 327 U.S. 114 (1946), the conclusion is inescapable that a registrant is denied due process.

Judge Ritter so held in *United States v. Capson*, Cr. No. 8059, (D. Utah 1965), as the following colloquy from the transcript of the trial indicates:

"THE COURT: . . . The only place he has a trial on this issue in any real sense is before that

draft board, and maybe he is entitled to an attorney there . . . .

MR. WINDER: That says in a non-judicial proceeding like this, where . . . .

THE COURT: Well, it is judicial.

MR. WINDER: No, Your Honor.

THE COURT: You can't say that is non-judicial when the record is not reviewable here . . . ."

Judge Ritter held that the defendant was entitled to counsel. His decision was reversed on appeal, *United States v. Capson*, 347 F. 2d 959 (10th Cir. 1965), on the ground that the local board proceeding was not a judicial one. Whatever the merits of that decision may have been prior to the amendment of 1967, which eliminated the opportunity to make a record before the Justice Department examiner, it ought not to be followed today, particularly in light of recent decisions emphasizing the importance of the right to counsel, among other rights, as fundamental to due process. *In re Gault*, 387 U.S. 1 (1967)—right to counsel in "non-criminal" juvenile proceedings; *Mempa v. Rhay*, 19 L. ed 2d 336 (1967)—right to counsel at hearing on revocation of probation; *Mathis v. United States*, 20 L. ed 2d 381 (1968)—right to counsel before commencement of criminal investigation by Internal Revenue Service.

Judged by these decisions, the provision of 32 C.F.R. § 1624.1 (b) "That no registrant may be represented before the local board by anyone acting as attorney or legal counsel", is patently unconstitutional. It not only does not provide for advising registrants of their right to counsel, but it rejects beforehand any request to be so represented.

B. *The Military Selective Service Act of 1967 is unconstitutional because it purports to authorize compulsory conscription during peace time.*

In *Holmes v. United States*, 20 L. ed. 2d 856 (1968), the Court refused to grant a petition for writ of certiorari on the question of compulsory conscription in time

of peace. Mr. Justice Douglas dissented pointing out that in *Hamilton v. Regents of University of California*, 293 U.S. 245, 265 (1934), Mr. Justice Cardozo wrote a concurring opinion (joined by Justices Brandeis and Stone) in which he indicated that the question was an open one. Mr. Justice Douglas shows that the Act of 1917 was the first law in our nation's history requiring military service, and that with the exception of occasional dicta, the Supreme Court has never considered the power to conscript in time of peace. 20 L ed. 2d at 857-864. The question likewise has not been determined either in this Court or in the Court of Appeals.

The historical record provides ample support for the conclusion that the framers of the Constitution denounced the principle of compulsory military service in peacetime. The following is an excerpt from a brief submitted by the Honorable Burton K. Wheeler of Montana, member of the Senate of the United States, on behalf of the Lawyers' Committee to Keep the United States Out of War which, by unanimous consent, is printed in the Appendix to the Congressional Record for August 23, 1940:

"Our own Declaration of Independence categorically declared the causes which impelled the Colonies to separate from England. The signers of that memorable document were addressing themselves to all mankind. They were not dwelling upon trivialities when, in submitting their grievances 'to a candid world,' they said of their royal oppressor: .

'He has kept among us, in times of peace, standing armies without the consent of our legislature.

'He has affected to render the military independent of and superior to the civil power.'

And in the turbulent period of the Revolutionary War itself, with the life of the new country at stake, Thomas Jefferson, himself a signer of the Declaration wrote John Adams on May 16, 1777:

'... Our battalions for the continental service were sometime ago so far filled as rendered the recom-

mentation of a draft from the militia requisite, and the more so as in this country it ever was the most unpopular and impracticable thing that could be attempted. Our people, even under the monarchical government, had learnt to consider it as the last of all oppressions.' . . . Adams, C.F., *The Life and Works of John Adams* (Boston, 1854), volume IX, page 465.

Jefferson's opposition was typical of the prevalent sentiment among the young Nation's leadership. They recognized, though not without misgiving, the conceivable necessity of a standing army even in peacetime, but the record shows that in the spirit of the Declaration they were adamant in their opposition to raising it by conscription.

Thus in 1775 the Continental Congress had resolved 'to raise several companies of riflemen by enlistment for 1 year, to serve in the American Continental Army' (Elliot's *Debates* (Ed. 2, 1854), vol. 1, p. 47); and the commission to George Washington, as Commander in Chief of the American Army subscribed by the President of the Congress on the 19th day of June 1775, declared:

'We, reposing especial trust and confidence in your patriotism, conduct, and fidelity, do by these presents, constitute and appoint you to be General and Commander in Chief of the Army of the United Colonies, and of all the forces raised or to be raised by them, and of all others *who shall voluntarily offer their service*, and join the said Army for the defense of the American liberty, and for repelling every hostile invasion thereof . . .' (Elliot, *supra*, p. 47).

Throughout the conflict which followed the practice of using only enlisted men in the Army never varied. The States, too, in filling their quotas fixed by the Congress, resorted to the method of volunteer service only. True, it was assumed that all able-bodied men were available for war service, but this was deemed

a privilege of Americans, not a duty exacted by law (Brandeis, J., in *Gilbert v. Minnesota*, 254 U.S. 325, 339 (1920)).

And Mr. Nason:

'Suffer me, sir, to say a few words on the fatal effects of standing armies, that bane of republican governments. . . . Britain attempted to enforce her arbitrary measures by a standing army. But, sir, we had patriots then who alarmed us of our dangers; who showed us the serpent and bade us beware of it. Shall I name them? . . . We had a Hancock, an Adams, and a Warren. Our sister States, too, produced a Randolph, a Washington, a Greene, and a Montgomery who led us in our way . . .' (Elliot, *ibid.*, vol. 2 p. 136.)

In Virginia, Patrick Henry thundered:

'A standing army we shall have, also, to execute the execrable commands of tyranny' (Elliot, *ibid.*, vol. 3, p. 51).

And James Madison replied significantly:

'Let us observe, also, that the powers in the general government are those which will be exercised mostly in time of war . . . (Elliot, *ibid.*, vol. 3, p. 259).

And from George Mason came the prophetic words:

'But when once a standing army is established in any country the people lose their liberty' (Elliot, *ibid.* vol. 3, p. 380).

And Madison again replied:

'I most cordially agree with the honorable member last up, that a standing army is one of the greatest mischiefs that can possibly happen' (Elliot, *ibid.*, vol. 3, p. 381).

Edmund Randolph, Governor of Virginia, then and there agreed:

'With respect to a standing army, I believe there was not a member in the Federal Convention who



did not feel indignation at such an institution' (Elliot, *ibid.*, vol. 3, p. 401).

And Mr. Dawson concluded:

'Governments ought not to depend on an army for their support, but ought to be so formed as to have the confidence, honor, and affection of the citizens' (Elliot, *ibid.*, vol. 3, p. 611).

### The Constitution

After victory and achievement of independence, the unabated aversion to any Federal peacetime army, disclosed in every recorded reference to the subject, implies a clear intent against peacetime conscription.

On August 6, 1787, a committee of five delivered the draft of a constitution to the Constitutional Convention, whose proceedings had been referred to them for that purpose. Article VII, section 1, provided that the Legislature of the United States be empowered 'to raise armies' (Elliot, *ibid.*, vol. 1, p. 226); it was later moved and seconded to insert 'and support' between 'raise' and 'armies' (Elliot, *ibid.*, p. 248); but, a further amendment adopted by the Convention added the words 'but no appropriation for money for that use shall be for a longer term than 2 years' (Elliot, *ibid.*, p. 285). Such was the final version which was plainly quite different from the one originally submitted.

Yet, even this final version was under constant attack throughout the proceedings of the Convention and every possible effort was made to limit its effect. Farrand, *Records of the Federal Convention of 1787* ((1911), vol. 2, pp. 505, 509). Indeed, even as the Convention moved toward final adoption, voices were still heard in protest, and in protest—be it noted—against the maintenance of any standing army at all in peacetime. And, as a study of its proceedings will show, no delegate at that Convention, engaging in the acrimonious debate on this question of any stand-

ing army in peacetime, ever conceived, much less asserted, that along with this limited power the far more drastic power of peacetime conscription was to be conferred on the Congress.

But the Constitution had not yet been adopted. The States had still to ratify it. There, too, the popular aversion to standing armies manifested itself. In Massachusetts General Thompson, at the State Ratifying Convention, declared:

'We are now fixing a national consolidation. This section, I look upon it, is big with mischiefs. Congress will have power to keep standing armies. The great Mr. Pitt says standing armies are dangerous—keep your militia in order—we don't want standing armies.' (Elliot, *ibid.*, vol. 2, p. 80.)

From such a widespread sentiment came the reservations, provisos, and exceptions that attached to the ratifications of practically all the 13 States filed with the Constitutional Convention. We shall give merely the major ones here. From New Hampshire: 'that no standing army shall be kept up in time of peace, unless with the consent of three-fourths of the Members of each branch of Congress; nor shall soldiers in time of peace be quartered upon private houses without the consent of the owners' (Elliot, *ibid.*, vol. 1, p. 326); from New York, the admonition: 'that standing armies in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity; and that at all times the military should be under strict subordination to the civil power' (Elliot, *ibid.*, vol. 1, p. 328); from North Carolina: 'that no standing army or regular troops shall be raised or kept up, in time of peace, without the consent of two-thirds of the Senators and Representatives present in each House' (Elliot, *ibid.*, vol. 1, p. 330); and Rhode Island counseled: 'that standing armies, in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity' (Elliot, *ibid.*, vol. 1, p. 335). This brief historical survey establishes the temper

of the people and their representatives on this basic issue when the Constitution itself was being debated. Clearly, a deep-seated fear and aversion to compulsory service in peacetime were the dominant sentiments at the time. They are expressed in the restrictions and qualifications attached to the power in course of debate, in the pronouncements of important leaders of the day, and in the reservations of the ratifying States.

It is manifest from the foregoing that the framers of the Constitution, the States which ratified it, and the people who ordained and established it never intended to empower the Federal Government to compel military service in peacetime." (Emphasis added)

See also "The Constitutionality of Peacetime Conscription," 31 Va. L.R. 40-82.

In the face of the historical record, the argument is customarily advanced that Congress has the inherent power to do whatever is "necessary", and the Courts of Appeal which have upheld the constitutionality of compulsory military service reject out of hand any suggestion that the question of "necessity" is justiciable. For instance, the Court of Appeals for the Sixth Circuit quoted with approval the following language:

"Nor may the Court inquire into the wisdom of the legislation. *Nor may it pass upon the necessity for the exercise of power possessed*, since the possible abuse of power is not an argument against its existence." *United States v. Butler*, 389 F. 2d 172, 177 (1968).

But the justiciability of the existence of a constitutional or legislative fact is hardly a new concept in the law.

In *Block v. Hirsh*, 256 U.S. 235 (1921) and *Chastleton Corporation v. Sinclair*, 264 U.S. 543, 547-549 (1924), concerning the constitutionality of rent control legislation, Mr. Justice Holmes expressly recognized that a legislative declaration of fact "may not be held conclusive by the courts."

In *Weaver v. Palmer Bros.*, 270 U.S. 402, 410 (1926), involving a statute forbidding the use of shoddy in bedding and upholstery, Mr. Justice Butler stated that "it is always open to interested parties to show that the legislature has transgressed the limits of its power."

In *City of Hammond v. Schappi Bus Line*, 275 U.S. 164 (1927) dealing with an ordinance limiting the right to operate buses, the Supreme Court again upheld the justiciability of facts necessary to a constitutional decision. In a concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927), Mr. Justice Brandeis observed that the existence of a clear and present danger sufficient to justify California's criminal syndicalism act was justiciable.

Likewise in *Borden's Farm Products Company, Inc. v. Baldwin*, 293 U.S. 194, 209, 210 (1934), involving the New York Milk Control Law, the court rejected "the presumption which attaches to the legislative action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such it is a rebuttable presumption. . . ."

In *U. S. v. Carolene Products Co.*, 304 U.S. 144, 152-154 (1938), the Court upheld a statute barring filled milk products from interstate commerce, because the requisite supporting facts had been adjudicated. The decision in *Smith v. California*, 361 U.S. 147, 165, 172 (1959) struck down an ordinance prohibiting possession of obscene literature. In their separate concurring opinions, Justices Frankfurter and Harlan emphasized the central importance of adjudicating the factual underpinnings of a statute. See also *Kress, Dunlap & Lane, Inc. v. Downing*, 286 F. 2d 212 (3rd Cir. 1960); Alfange, "The Relevance of Legislative Facts in Constitutional Law," 114 Pa. L.R. 637, 648 (1966).

The principal source of evidence that the draft is unnecessary, as well as wasteful, comes from members of the Congress. Senator Nelson's Plan to End the Draft in 1967, June 29, 1964, 110 C.R. 15365-70; Senator Nelson, February 9, 1965, 111 C.R. 2327-30 and 2333-36; Senator McGovern, June 29, 1964, 110 C.R. 15371; Senator Keating, June 29, 1964, 110 C.R. 15371; Representative Ellsworth, June 28, 1966, Review of the Adminis-

tration and operation of the Selective Service System, Hearings before the Committee on Armed Services, House of Representatives, 89th Congress, Second Session, (hereinafter "Hearings") 9756-9761; Representative Curtis, March 4, 1963, 109 C.R. 3413-7; Representative Lindsay, April 21, 1964, 110 C.R. 8575-6; Representative Taft, April 21, 1964, 110 C.R. 8578-80; Representative Clawson, April 21, 1964, 110 C.R. 8586-7; Representative Kastenmeier, June 29, 1966, Hearings 9872-7; Representative Tunney, June 29, 1966, Hearings 9877-80.

It would serve no purpose to detail the evidence which establishes very serious doubt, at the least, if not conclusive proof, that the draft is unnecessary. It suffices to note that Thomas D. Morris, Assistant Secretary of Defense (Manpower), testifies on June 30, 1966, that the additional cost of an all-volunteer army would probably be in the range of \$5 to \$9 billion, with a ceiling of \$17 billion. This estimate is, of course, challenged by the congressional opponents of the draft. But the significant fact is that even the defenders of the draft are able to place a dollar amount on the savings allegedly effected by the draft.

Consequently, the draft is not "necessary". It does not meet the "clear and present danger" test of legislation which, as does the draft, "broadly stifle[s] fundamental personal liberties," *Shelton v. Tucker*, 364 U.S. 479, and deeply "invade[s] the area of protected freedoms," *NAACP v. Alabama*, 377 U.S. 288, 307, and *Aptheker, v. Secretary of State*, 378 U.S. 500, 508.

While the draft might be sustained if the "rational basis" test applied to commercial regulation were applied, the appropriate standard in this area of personal liberty is the existence of a "clear and present danger". *Thomas v. Collins*, 323 U.S. 516, 527-530.

## CONCLUSION

For the reasons herein stated, the indictment returned against the defendant should be dismissed.

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JOHN G. S. FLYM  
Attorney for Defendant



UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

AFFIDAVIT OF JOHN HEFFRON SISSON IN SUP-  
PORT OF HIS MOTION TO DISMISS THE IN-  
DICTMENT RETURNED AGAINST HIM

John Heffron Sisson, defendant in the above-entitled cause, first being duly sworn, deposes and says as follows:

At the time I refused to submit to induction into the armed forces I believed, as I believe today, that the United States military involvement in Vietnam is illegal under international law as well as under the Constitution and treaties of the United States. I believed then, and still believe, that my participation in that war would violate the spirit and the letter of the Nuremberg Charter. on the basis of my knowledge of that war, I could not participate in it without doing violence to the dictates of my conscience.

/s/ John H. Sisson Jr.  
JOHN HEFFRON SISSON

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

October 21, 1968

Then personally appeared the above-named John Heffron Sisson who, being duly sworn, on oath deposed and said that the foregoing statements are true, before me.

/s/ [Illegible]  
Notary Public

My Commission expires: Oct. 25, 1974

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Cr. 68-237-W

UNITED STATES OF AMERICA

—against—

JOHN SISSON, DEFENDANT

STATE OF NEW YORK )

) SS.:

COUNTY OF NEW YORK )

WILLIAM M. KUNSTLER, being duly sworn, deposes and says:

I was chief counsel in *United States of America v. Philip Berrigan, et al.*, Cr. # 28,111, in the United States District Court for the District of Maryland. On Wednesday, October 9, 1968, after defendants had offered into evidence *Viet Nam and International Law*, a book whose purpose it is to prove the illegality of the American military involvement in Viet Nam, the government conceded that the defendants' view that said military involvement was illegal, was reasonable. After said concession, I asked the court reporter to transcribe the colloquy relating thereto, and I am attaching it herewith as Exhibit A to this affidavit.

After said concession, defendants made no further efforts to produce any expert testimony or documentary evidence relating to the illegality of American military involvement in Viet Nam.

I am submitting this affidavit at the request of John Flynn, Esq., the attorney for the defendant in the within prosecution.

/s/ William M. Kunstler  
WILLIAM M. KUNSTLER

Sworn to before me this 17th day of October, 1968.

/s/ Paul L. Klein  
PAUL L. KLEIN

Notary Public, State of New York  
No. 31-7266180

Qualified in New York County  
Commission Expires March 30, 1970

[fol. 1] (Extract from proceedings before His Honor Roszel C. Thomsen, Chief Judge, in the matter of United States of America v. Philip Berrigan, et al., Criminal No. 28111, on Wednesday, October 9, 1968.)

THE COURT: The Government has conceded that his belief that the war was illegal is sincere.

MR. BUCHMAN: That is right.

THE COURT: Then, does the Government contend that the reasonableness or the unreasonableness of his view, with respect to the legality of the war has any bearing on this case?

MR. MURPHY: Your Honor, it is completely irrelevant. I think the real issue is the reasonableness of the conduct as it relates to what the law requires.

THE COURT: I will rule on that question when we come to it.

If you contend that the reasonableness of his belief is an issue in the case, I will have to let in all of this evidence. We will be here and let people read all of these books, if you are going to contest the reasonableness of his views.

MR. MURPHY: We say it is irrelevant.

THE COURT: Do you contest it? Mr. Buchman and the other defendants think it is relevant. You think it is irrelevant. I have not ruled yet. I am not yet ruling [fol. 2] on the bearing it may have. It may have a bearing on the question of motive on the fourth count, as I have said before.

And on that ground and on other grounds, if I can be persuaded that there are other grounds later, I will admit it.

You agree he is sincere. You say you do not contest—

MR. MURPHY: No, Your Honor. We say that a reasonable man could have his views.

THE COURT: All right. Then, I take it that the Government is not contending that his views that the war is illegal are so unreasonable that a reasonable man could not have them.

I take it that means that the Government, insofar as that may be an issue in the case—which I am not ruling;

I am not saying that the reasonableness of his views have anything to do with the case, but if they do have—the Government is not contesting it, is that correct?

I notice Mr. Sachs, sitting in the second row, is nodding. Since he is the chief United States representative in this District, I take that to mean that I have correctly stated the Government's position.

Therefore, I will rule the book immaterial.

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Cr. No. 68-237-W

WYZANSKY, D.J.

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

APPEARANCES:

JOHN WALL, Esq., Assistant United States Attorney,  
counsel for the government.

JOHN G. S. FLYM, Esq., counsel for the defendant.

Court Room No. 6,  
Federal Building,  
Boston, Mass.,

November 4, 1968.

[fol. 2] The COURT. Criminal No. 68-238-W, United States against John Heffron Sisson, Jr. Is this a long argument?

Mr. FLYM. I don't think so, your Honor.

The COURT: Go ahead. The Motion to Dismiss first.

Mr. FLYM. Yes, your Honor. May it please the Court, I have not received a brief from counsel for the government.

The COURT. I don't suppose the government has filed a brief. Have they?

Mr. WALL. No, sir.

Mr. FLYM. I understand no brief will be filed. That is, the government's position appears to be that all of these questions have previously been considered and determined adversely to the defendant in this case. The purpose of filing this motion, your Honor, and the purpose of filing a brief, was in essence to attempt to have a kind of pretrial conference because we intend to pro-



duce, at least offer such evidence at the time of the trial, and instead of consuming a great deal of time and expense we would like to resolve the question as to the nature of the evidence which will be admissible at the trial if it can be done.

I can very briefly capsule the content of our motion [fol. 3] to dismiss if the Court would like me to do so. I have nothing to add substantially to what the brief contains, possibly with one exception, the exception having to do with the bearing of the illegality of the war.

I have in mind, your Honor, decisions of the Supreme Court dealing with violation of the trespass state

The COURT. The what statute?

Mr. FLYM. The trespass statute.

The COURT. What section?

Mr. FLYM. In an analogous area of the law, your Honor. There is a whole body of law which, as your Honor knows, is referred to as the sit-in cases in which violations, affirmative acts, conduct which was affirmative, and in violation of an act, was held to be justified, and the argument that there was a violation of the trespass statute was thought to be not really to the point because the trespass statute was invoked in behalf of an illegal purpose—in that case segregation. But we have other cases. In a recent case, the United States Supreme Court again held that the trespass statute could not be invoked to prevent picketers from picketing.

• We have other cases. For instance, the New York Port Authority decision, in the 2d Circuit. I think the gist of these cases, your Honor, and a host of other cases, [fol. 4] which could easily be presented to the Court, is that the violation of a given statute—in this particular case the failure to step forward, a request was made by the government to the defendant to step forward and he refused to step forward—no one is denying this is what in fact occurred—the question is whether there is any justification for his failure to step forward. We think that all of the questions raised, the illegality of the war, the reasonable belief of the illegality of the war, are supported by the most eminent authority, in so far as

international law is concerned, supported by independent, objective authority with respect to violations of the rules of warfare, supported by Congressional testimony having to do with the Tonkin Resolution. These certainly have a bearing with respect to justification.

Furthermore, the Constitutional right of conscience, your Honor, is an open question as is the question of peacetime conscription. As a matter of fact, Justices Cardozo and Brandeis thought that the issue was open, and there have been no decisions since that time expressing—

The COURT. You mean no Supreme Court decisions.

Mr. FLYM. Yes, your Honor, that is correct. I believe there have been no decisions in this Circuit or District.

The COURT. I am not so sure about that.

[fol. 5] Mr. FLYM. In any event, it seems to me that all of these issues are open. We would propose to go forward with respect to preparing evidence on each of these points and proffer such evidence at the time of trial.

In so far as the motion for discovery is concerned I have inquired what the particular objections may be with respect to that motion. At least as of 1:30 today, your Honor, it was still unclear whether the government would object to any of the items which we sought to have produced for discovery.

The COURT. If your object is to uncover the government's strategy, I don't think that I will use this hearing for that purpose. I don't know of any reason why under any rule of Court I should do that. Some of the points raised in your motion, for example, point No. 2, 'That the defendant reasonably believes the government's military involvement in Vietnam is illegal, are points which cannot be raised in the way that you propose to raise them, because that does not appear on the face of the indictment.

Mr. FLYM. That is quite correct, your Honor.

The COURT. So there is nothing to point 2. As to point 1, one of your difficulties, I suppose, is that you

cannot show, can you, that a person who is, as a matter of fact, inducted into the Army or Military Service will [fol. 6] indeed serve in Vietnam?

Mr. FLYM. I don't think that is required, your Honor.

The COURT. Well, how can he show that he has such a standing as to question the involvement in the Vietnam war? I am not saying that you haven't got a cognate point, which might be that the draft is invalid for other reasons.

Mr. FLYM. Your Honor, I believe that if anyone has standing with respect to the illegality of the war, this defendant does.

The COURT. At this stage when he doesn't know whether he, for example, will be sent to Germany or to Atlanta?

Mr. FLYM. I think so, your Honor. The decisions, recent decisions specifically decline interlocutory relief, injunctive relief with respect to one man who—

The COURT. I don't think you ought to move from interlocutory relief or injunctive relief to criminal process. Is there anything which supports your view that in connection with an order to report or an order to step forward a person who objects can object on the ground that he is being required to take the first step toward fighting in Vietnam?

[fol. 7] Mr. FLYM. I think so, your Honor.

The COURT. How do you know that? How does he know that? How do I know that?

Mr. FLYM. I think, first of all, there is authority. Secondly, I don't think it is important.

The COURT. That is another question. But he doesn't know, does he?

Mr. FLYM. Well, statistically, he could establish the chances are he would go. The basic argument, your Honor, is that if the war is illegal, it is demonstrable that the draft is being used to foster this illegal war.

The COURT. I didn't agree or disagree with what you just said. I am raising the problem as to whether he has the standing to raise that question now or whether his standing to raise the question comes at a later stage.

Mr. FLYM. I don't think so, your Honor, because I believe that to deny him the opportunity to raise it at this point in time would be to deny him the opportunity to raise it at all probably.

The COURT. Why do you say that? Because it may not be that if he were inducted, and if he were not kept within the United States, and if he were not sent to some European or African or what-not place but were indeed sent to Vietnam, then it might be that when that order [fol. 8] directly affected him and issued to him he would have a standing. Are you sure he wouldn't have a standing?

Mr. FLYM. Your Honor, I believe his standing at that point would be no better than his standing today.

The COURT. Well, do you concede that he would have a standing to raise the question at that point?

Mr. FLYM. Not if he has no standing today, your Honor.

The COURT. Well, it certainly has focused on him and his future in a way that it has not yet focused, isn't that right?

Mr. FLYM. Well, your Honor, I don't think so. I think the focus is not sufficiently sharp at that time, sufficiently sharper at that time than it is today. He would have no standing under that reasoning until he was actually ordered to shoot at a Vietnamese, for instance.

The COURT. Well, that might be too late. Presumably at that moment he would be outside the jurisdiction of a United States District Court.

Mr. FLYM. He probably is at the time he—

The COURT. Is he outside the jurisdiction of the United States District Court at the time that he is given a direct order to proceed to Vietnam?

Mr. FLYM. My understanding, your Honor, is that [fol. 9] there is a case from the District of Colorado which so held.

The COURT. Don't you think you better brief that so that I am persuaded of the correctness of your point that he now has a standing? That is the only question that I put to you, you realize, not the question as to

whether or not the substantive issue you are trying to raise is or is not well founded but whether at this moment he has a standing.

Are you associated with other people in connection with the preparation of this type of case?

Mr. FLYM. Yes, I am, your Honor.

The COURT. Are you working with some kind of group, which I will loosely call a draft counseling group?

Mr. FLYM. Loosely call—? It isn't really a draft counseling group.

The COURT. What is it?

Mr. FLYM. It is the Committee For Legal Research On The Draft.

The COURT. Haven't you dug into the point of locus standi?

Mr. FLYM. No.

The COURT. Don't you think you ought to?

Mr. FLYM. I would very much appreciate the opportunity.

[fol. 10] The COURT. I will give you the opportunity to do that because I think that that is the first thing for you to persuade me of—if you are in a standing position to raise the issue, or your client is.

Mr. FLYM. Yes, your Honor.

The COURT. I am not persuaded as of yet. I have an open mind but I am not persuaded. That relates to both point 1 and point 3. Point 2 is plainly premature because nobody can test the issue as to whether defendant reasonably believes the government's military involvement in Vietnam is illegal without knowing what he reasonably believed, and what he believed is a question of evidence and not a question which appears on the face of the indictment.

Mr. FLYM. If I may remark to that point, your Honor? My sole purpose in raising the point at this time was again in the interest of economy. It was not clear at the time I filed the motion that the government would challenge this fact. That is, they may concede—

The COURT. I will give you the opportunity to hear that. I shall perhaps not be surprised and maybe you won't either by what the government's position is going to be here. All right. Mr. Wall.



Mr. WALL. Your Honor, with regard to the motion for discovery and inspection—

[fol. 11] The COURT. On the motion to dismiss the indictment, you do oppose it, of course?

Mr. WALL. Yes, sir.

The COURT. Well, I am not at this stage going to deny the motion. I am going to say that the second ground is without merit, on the motion to dismiss the indictment; on the grounds 1 and 3 I would like to be advised as to why the question has not been prematurely raised with respect to 1 and with respect to 3, and I will allow both sides a week to brief that matter. A week means Tuesday of next week because Monday is regarded as a holiday—especially appropriate in this kind of case.

On the motion with respect to discovery, do you want to say anything?

Mr. WALL. Your Honor, with regard to the week I wonder if I might have a little longer?

The COURT. You may have two weeks from today, yes.

Mr. WALL. Thank you, your Honor.

The COURT. Now what about the motion for discovery and inspection? Do you oppose that?

Mr. WALL. The government agrees to 1, 2, and 3, your Honor. No. 4, the correspondence mentioned therein would be contained in the registrant's file. The government [fol. 12] agrees to 5, 6 and 7. No. 8, the government opposes for the reason set out in the regulations, at 1606.62(c), which says, "In accordance with the reasoning of Federal Personnel Manual Letter 7-11-8 issued by the Civil Service Commission, the home address and other personal data concerning the officials designated in (b) above will not be released unless (a) the person to whom the data relates consents to such release or (b) the Board Chairman determines in writing after consultation with the person to whom the data relates the disclosure would not harm such person and would not constitute a clearly unwarranted invasion of his personal privacy." The local board members are prohibited by regulation, the local boards are prohibited by regulation from releasing that information, your Honor.

The COURT. I don't understand why 8 is thought to be relevant to this particular case. Will you tell me why?

Mr. FLYM. Yes, your Honor. The Selective Service Act relies almost entirely, in so far as fact finding is concerned, on the action of local board members, and in particular the regulations require that there be no direct ties between the local board members and the military.

There are other requirements, such as age, for instance, and length of service on the local board, which for whatever reasons have been made prerequisites for serving on the board, and it seems to me that the members—

The COURT. That certainly relates to 8, the military status point. They are required to be citizens, too, is that right?

Mr. FLYM. Yes.

The COURT. And the names, of course, are relevant. But why the address, age and date of appointment?

Mr. FLYM. Well, the date of appointment is significant only with respect to the 25 year service limitation.

The COURT. That is a limitation, too?

Mr. FLYM. Yes, your Honor.

The COURT. All right. I think that is relevant.

Mr. FLYM. The age is also. There is also a requirement as to a maximum age. The names and addresses are solely for evidentiary purposes.

The COURT. As to the address, you mean to check the accuracy of the statements?

Mr. FLYM. Yes. We would rely on the government's representations as to these items.

The COURT. I am going to direct that the government furnish the information in 8 because if there were indeed with respect to the accuracy of the Board a question as to whether the members of the Board were qualified in accordance with the rules and regulations, it is a [fol. 14] point which could reasonably be challenged.

Mr. WALL. Your Honor, may the government be excused from supplying the addresses?

The COURT. Well, as to the addresses, that is not really pressed, is it?

Mr. FLYM. No, your Honor.

The COURT. All right. (a), (c), (d), (e) and (f). What about 9?

Mr. WALL. No. 9, your Honor, the local Board memorandums are available for examination by counsel at Selective Service headquarters, if he wants to see them, but I know he already has them.

The COURT. Do you have them already?

Mr. FLYM. Your Honor, I have what is called the Selective Service Reporter. I have discussed the question of the accuracy of the local Board memorandums with my brother, and he agrees that he will not challenge—

Mr. WALL. No, I do not agree that your copy of the Selective Service law reports—I don't agree that his copy is going to be absolutely correct. What I do say, your Honor, is that according to regulation 1606.57 a complete copy of the local Board memorandums can be acquired from the Government Printing Office.

If counsel wants to go over to the Selective Service [fol. 15] headquarters and look at them there, fine, but I don't think the government should be required to supply copies of them.

The COURT. If they are all public documents then I agree there is no need to impose upon the government the purchase price or the cost of supplying them. It is up to you to get them. If they are available, then they stand no different from statutes.

Mr. FLYM. I agree. It was my understanding they weren't available.

The COURT. Mr. Wall says they are.

Mr. WALL. No. 10 makes the forms a part of the regulations.

The COURT. That is covered by my prior ruling.

Mr. WALL. Yes, sir.

The COURT. That covers everything, does it?

Mr. FLYM. Yes, your Honor.

The COURT. All right.

Mr. FLYM. Your Honor, one point of clarification. Is the two weeks from today also Tuesday?

The COURT. No, Monday. Two weeks from today is a Monday.

\* \* \*

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

DEFENDANT'S SUPPLEMENTAL MEMORANDUM  
IN SUPPORT OF HIS MOTION TO DISMISS.

On November 4, 1968, when the first hearing was held on defendant's Motion to Dismiss the indictment returned against him, the Court invited both parties to submit briefs on the question of defendant's "standing" to seek an adjudication of the illegality of the Vietnam conflict as justification for his refusal to obey an order for induction into the armed forces of the United States.

As previously stated in the course of oral argument on November 4, the purpose of defendant's Motion to Dismiss is to obtain a determination as to the legal sufficiency of certain defenses. Consequently, a large part of the Memorandum of Points and Authorities submitted in support of the Motion to Dismiss is devoted to an outline of the kind of evidence which would be offered at the time of the trial to substantiate these defenses. This outline hardly exhausts the evidence which defendant may present at his trial. For instance, if necessary defendant will establish that he probably would not have been ordered to report for induction were it not for the Vietnam war.

However, independently of such facts, this memorandum will show that defendant has standing to seek an adjudication that the Vietnam war is illegal.

A. *A Criminal Defendant is Entitled to Raise all Defenses.*

In his classical article "The Power of Congress to limit the Jurisdiction of Federal Courts: An Exercise in Di-

alectics," 66 Harv. L. Rev. 1362 (1953), Henry Hart maintains that the doctrine of exhaustion of remedies marks the maximum inroad on the right of a criminal defendant to challenge the legality of an order he is accused of violating. The following colloquy, while of general applicability, is particularly addressed to one of the landmark decisions involving the selective service laws, *Estep v. United States*, 327 U.S. 114 (1946):

"Q. Doesn't that pretty well destroy your notion that there has to be some kind of reasonable means for getting a judicial determination of questions of law affecting liability for criminal punishment? *All Congress has to do is to authorize an administrative agency to issue an individualized order, make the violation of the order a crime in itself, and at the same time immunize the order from judicial review. On the question of the violation of the order, all the defendant's rights are preserved in the criminal trial, except that they don't mean anything.* . . .

A. Stop and think before you say that. Except for two Justices who are now dead, the whole Court dealt with the question as if it were merely one of statutory construction. *Three Justices of the Supreme Court of the United States were willing to assume that Congress has power under Article I of the Constitution to direct courts created under Article III to employ the judicial power conferred by Article III to convict a man of a crime and send him to jail without his ever having had a chance to make his defenses. No decision in 164 years of constitutional history, so far as I know, had ever before sanctioned such a thing. Certainly no such decision was cited. For these three didn't even see it as a problem. There is ground to doubt whether the first three in the majority did either.*

Bear in mind that the three dissenters from the court's construction expressly recognized that the order of induction might have been erroneous in law. They said that the remedy for that was habeas cor-



pus after induction. They seemed to say that the existence of the remedy of habeas corpus saved the constitutionality of the prior procedure. That turns an ultimate safeguard of law into an excuse for its violation. And it strikes close to the heart of one of the main theses of this discussion—that so long at least as Congress feels impelled to invoke the assistance of courts, the supremacy of law in their decisions is assured.” 66 Harv. L. Rev. 1362, 1380, 1382, 1383. (Emphasis added).

Mr. Justice Murphy wrote a concurring opinion in *Estep v. United States*, *supra*, passionately and eloquently articulating the right of a criminal defendant “. . . to present every possible defense to a criminal charge . . .”:

“If, as I believe, judicial review of some sort and at some time is required by the Constitution, then when and where can these petitioners secure that review? They have not had a prior chance to obtain review of the induction orders; nor will they subsequently be accorded the opportunity to test their contentions in court. *It is no answer that they should have pursued different courses of action and secured writs of habeas corpus after induction. Due process of law is not dispensed on the basis of what people might have or should have done. The sole issue here is whether due process of law is to be granted now or never.* The choice seems obvious.

By denying judicial review in this criminal proceeding, the courts below in effect said to each petitioner: You have disobeyed an allegedly illegal order for which you must be punished without the benefit of the judicial review required by the Constitution, although if you had obeyed the order you would have had all the judicial review necessary. I am at a loss to appreciate the logic or justice of that position. It denies due process of law to one who is charged with a crime and grants it to one who is obedient. It closes the door of the Constitution to a person whose liberty is at stake and whose need for due process

of law is most acute. In short, it condemns a man without a fair hearing.

There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal. I am not yet willing to conclude that we have such a system in this nation. Every fiber of the Constitution and every legal principle of justice and fairness indicate otherwise. *The reports are filled with decisions affirming the right to a fair and full hearing, the opportunity to present every possible defense to a criminal charge and the chance at some point to challenge an administrative order before punishment.* Those rudimentary concepts are ingrained in our legal framework and stand ready for use whenever life or liberty is in peril. The need for their application in this instance seems beyond dispute.

We must be cognizant of the fact that we are dealing here with a legislative measure born of the cataclysm of war, which necessitates many temporary restrictions on personal liberty and freedom. *But the war power is not a blank check to be used in blind disregard of all the individual rights which we have struggled so long to recognize and preserve.* It must be used with discretion and with a sense of proportionate values. In this instance it seems highly improbable that the war effort necessitates the destruction of the right of a person charged with a crime to obtain a complete review and consideration of his defense. *As long as courts are open and functioning judicial review is not expendable.*

All of the mobilization and all of the war effort will have been in vain if, when all is finished, we discover that in the process we have destroyed the very freedoms for which we fought." 327 U.S. 114, 130-132. (Emphasis added).

In short, since the Government asks this Court to enforce a governmental order, this Court has jurisdiction

to adjudicate the legality of that order, and defendant is entitled to such an adjudication. If the illegality of the Vietnam war is, in Mr. Justice Murphy's phrase, a "possible defense", defendant must be afforded the opportunity to present that defense.

*B. To Require Defendant to Become a Member of the Military Is to Deny Him All Opportunity to Obtain an Adjudication of the Legality of the Vietnam War.*

Defendant is forever denied the opportunity to challenge the legality of the Vietnam war if he is required to become a member of the military and await orders for a Vietnam assignment before making his challenge.

In *United States v. Johnson*, 18 USCMA 246, 38 CMR 44 (1967), the highest military court held:

"Under domestic law, the presence of American troops in Vietnam is unassailable. *United States v. Smith*, 13 USCMA 105, 32 CMR 105. The legality under international law of the American presence in Vietnam is not a justiciable issue. As long ago as *Martin v. Mott*, 12 Wheat 19, 29 (U.S. 1827), the Supreme Court rejected the idea that the orders of the President as Commander-in-Chief may be so questioned. . . ."

Thus, it is plain that any attempt to convince a military court that the Vietnam war is illegal, under either domestic or international law, would be futile.

Once in the military, defendant would not be able to challenge an order, including an order assigning him to duty in Vietnam, except by habeas corpus review of a court martial conviction. *Luftig v. McNamara*, 373 F. 2d 664 (D.C. Cir. 1967), cert. den. *sub nom*, *Luftig v. McNamara*, 389 U.S. 934; *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Levy v. Cochran*, 389 F.2d 929 (D.C. Cir. 1967); *Noyd v. McNamara*, 267 F.Supp. 701 (D. Colo. 1967), aff'd, 378 F.2d 537 (10th Cir. 1967), cert. den., 19 L.ed ad 667 (1967). And a court martial proceeding is hardly the equivalent of its civilian counterpart, as

the Supreme Court's detailed analysis in *Reid v. Covert*, 354 U.S. 1 (1956) emphasizes:

Courts-martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of 'command influence.' In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Frequently, the members of the court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings—in short, for their future progress in the service. *Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.*" 354 U.S. 36. (Emphasis added).

Closing the circle of military authority which surrounds members of the armed forces is the fact that civilian review of a court-martial conviction is exceedingly narrow. As expressed by Mr. Justice Minton in his concurring opinion in *Burns v. Wilson* 346 U.S. 137 (1953).

- "If error is made by the military courts, to which Congress has committed the protection of the rights of military personnel, that error must be corrected in the military hierarchy of the courts provided by Congress. *We have but one function, namely, to see that the military court has jurisdiction, not whether it has committed error in the exercise of that jurisdiction.*" 346 U.S. 137, 147. (Emphasis added).

While the standard for review adopted by the Court in *Burns v. Wilson*, *supra*, appears somewhat broader ("... the scope of matters open for review has always been more narrow than in civil cases..." but civil courts may determine whether the military decision has given fair consideration to the allegations set forth in the petition for writ of habeas corpus), such review does not extend to weighing the evidence considered by the court



martial. In short, habeas corpus review cannot guard against a prejudiced military determination; it scrutinizes, not the merits, but the process used in reaching the determination.

Manifestly, the only forum in which defendant can seek an adjudication of the illegality of the Vietnam war is this very Court. Even if prior resort to the military were desirable, defendant is not under obligation to exhaust military channels. See *Smith v. United States*, 199 F.2d 377, 382 (1st Cir. 1952); *United States v. McCrillis*, 200 F.2d 884, 886 (1st Cir. 1952), where the Court held:

"... a defendant ... charged with having violated an order ... is [not] precluded from setting up the defense that the ... order is invalid, merely because the defendant has failed to make use of an available administrative procedure by which he might have obtained administrative action to set aside the ... order."

To compel defendant to submit to military justice, however, is not desirable. Not only would it deprive defendant of his right to a jury trial; not only would it be futile because the highest military court has already passed adversely on the substance of defendant's contentions; \* and not only would it expose defendant to the

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\* Interestingly, the *Johnson* case, *supra*, relies for its sweeping conclusions on two cases which provide very weak support. The *Smith* decision is a prolix opinion which mentions in passing that the President is Commander-in-Chief; the facts in *Smith* are wholly unrelated to the questions at issue in *Johnson*. As for the *Martin v. Mott* case, it involved a 1795 statute granting a very limited authority to the President to call the militia in the event of invasion or imminent danger thereof. The Court held that the nature of the power permitted no conclusion other than that the President was to determine whether invasion was imminent. Despite the narrow scope of the power there involved—which contrasts sharply with the military court's notion of the President's power as Commander-in-Chief, Mr. Justice Story, writing for the Court, observed:

"A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude."



risk of prejudiced factual determinations with no prospect of civilian review; it would also be far more disruptive of the military; it would disrupt military discipline; it would disrupt military plans for deployment of personnel; it would waste military resources expended in training a soldier who will not fight. It would require the empty ritual of having the army administer, and the defendant take, the oath specified in AR 601.270, ¶ 37b: "... I will obey the orders of the President of the United States and the orders of the officers appointed over me ...". Therefore, both parties have a mutual interest in having the legality of the Vietnam war adjudicated at this time.

C. *In View of the Important Role of The Judiciary as a Legitimizing Organ for Governmental Action, this Court should Adjudicate the Legality of the Vietnam War.*

Criminal prosecutions involving selective service law have increased from 107 for the months of July, August and September, in 1965, to 221 for the same three months in 1966, to 249 for the same quarter of 1967 and to 658 for the same quarter of 1968. The figure of 658 for July through September 1968 represents 8% of all criminal prosecutions in the federal courts during those three months. Clearly, the government is relying very substantially on the federal courts to enforce the administration of the selective service system. If the function of the federal courts is to be worthy of respect, then the courts must exercise their power to review the legality of the orders which the government seeks to enforce.

As explained by Charles L. Black, Jr. in *The People and the Court, Judicial Review in a Democracy* 52-53, 223 (1960):

I have suggested that the most conspicuous function of judicial review may have been that of legitimatizing rather than that of voiding the actions of government. But one urgent warning must be added.

The power to validate is the power to invalidate. If the Court were deprived, by any means, of its real

and practical power to set bounds to governmental action, or even of public confidence that the Court itself regards this as its duty and will discharge it in a proper case, then it must certainly cease to perform its central function of unlocking the energies of government by stamping governmental actions as legitimate. If everybody gets a Buck Rogers badge, a Buck Rogers badge imports no distinction. The Court may go thirty or forty years without declaring an Act of Congress unconstitutional; that means nothing, for it is scarcely to be looked for that Congress will pass any given annual or decennial quota of statutes that the Court will regard as invalid.

But if it ever so much as became known—even as a matter of tacit understanding in the profession and on the Court, for such a secret could not be kept from the people—that the Court would not seriously ponder the questions of constitutionality presented to it and declare the challenged statute unconstitutional if it believed it to be so, then its usefulness as a legitimatizing institution would be gone.

Judicial review has two prime functions—that of imprinting governmental action with the stamp of legitimacy, and that of checking the political branches of government when these encroach on ground forbidden to them by the Constitution as interpreted by the Court. These two functions are not independent of each other; on the contrary, they may be looked on as different aspects of the same function. The investment of a tribunal with the checking function almost necessarily makes it a legitimating organ as to those governmental actions (the great majority, in our history) to which it finds no convincing constitutional objection. *On the other hand, the legitimating function cannot be performed (unless through a public deception which must be temporary in its success) by a tribunal not clothed with the conceded power to invalidate, for legitimization means decision, and decision is not decision unless it can go either way.* (Emphasis added).

It is perhaps for this reason that Mr. Justice Black has criticized the doctrine that constitutional questions should be avoided where a non-constitutional ground for decision can be found. In *A Constitutional Faith*, pp. 19-20 (1968), Mr. Justice Black explains:

"The essential protection of the liberty of our people should not be denied them by invocation of a doctrine of so-called judicial self-restraint. This term has been made an alluring one by its worshippers connoting noble judicial conduct, somewhat as the term 'judicial activism' has been used to connote something ignoble. But, as I have tried to make clear, when judges have a constitutional question in a case before them, and the public interest calls for its decision, refusal to carry out their duty to decide would not, I think, be the exercise of an enviable 'self-restraint.' Instead I would consider it to be an evasion of responsibility. In sum, I think determining when a judge shall decide a constitutional question calls for an exercise of sound judicial judgment in a particular case which should not be hobbled by general and abstract judicial maxims created to deny litigants their just deserts in a court of law, perhaps when they need the court's help most desperately.

The relevance of these broad principles to the present case, the necessity for this Court to adjudicate the legality of the Vietnam war, is clear in the perspective given by Mr. Chief Justice Warren in *The Bill of Rights and the Military*, printed in Cahn, *The Great Rights* (1963):

"But the people of the colonies had long been subjected to the intemperance of military power. Among the grievous wrongs of which they complained in the Declaration of Independence were that the King had subordinated the civil power to the military, that he had quartered troops among them in times of peace, and that through his mercenaries he had committed other cruelties. Our War of the Revolution was, in good measure, fought as a protest against standing armies. (p. 92)

Their apprehensions found expression in the diffusion of the war powers granted the Government by the Constitution. *The President was made the Commander-in-Chief of the armed forces. But Congress was given the power to provide for the common defense, to declare war, to make rules for the Government and regulation of the land and naval forces, and to raise and support armies, with the added precaution that no appropriation could be made for the latter purpose for longer than two years at a time—as an antidote to a standing army.* Further, provision was made for organizing and calling forth the state militia to execute the laws of the Nation in times of emergency . . . it is not unreasonable to believe that our Founders' determination to guarantee the preeminence of civil over military power was an important element that prompted adoption of the Constitutional Amendments we call the Bill of Rights. (pp. 93, 94)

Consequently, if judicial review is to constitute a meaningful restraint upon unwarranted encroachments upon freedom in the name of military necessity, situations in which the judiciary refrains from examining the merit of the claim of necessity must be kept to an absolute minimum. (p. 102)

Our history has demonstrated that we must be as much on guard against the diminution of our rights through excessive fears for our security and a reliance on military solutions for our problems by the civil government, as we are against the usurpation of civil authority by the army. That is the important lesson of the Court cases, most of which have arisen not through the initiative of the military seeking power for itself, but rather through governmental authorization for intervention of military considerations in affairs properly reserved to our civilian institutions. (pp. 111, 112)

President Eisenhower, as he left the White House only a year ago, urged the American people to be alert to the changes that come about by reason of



the coalescence of military and industrial power. His words were these:

[T]his conjunction of an immense military establishment and a large arms industry is new in the American experience. "The total influence—economic, political, even spiritual—is felt in every city, every state house, every office of the Federal Government. . . . [W]e must not fail to comprehend" . . . [the] grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society. [W]e must guard against the acquisition of unwarranted influence . . . by the military-industrial complex. . . .

We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. *Only an alert and knowledgeable citizenry can compel the proper meshing of the . . . machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.*" (p. 112)

To recapitulate, judicial review is a cornerstone of our democracy. It is a power which must be used, particularly to review the exercise of military power when challenged, as defendant challenges the legality of the Vietnam war on the basis, in part, that it has not been declared by Congress. The critical importance of defendant's challenge, and the pressing need for this Court to pass on its merits, is indicated by the following statements of Abraham Lincoln and Justice Story. Abraham Lincoln said:

The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved so to frame the



Constitution that no one man should hold the power of bringing this oppression upon us.

E. Corwin, *The President: Office and Powers*, 180 (4th ed. 1964).

Similarly, Mr. Justice Story has said:

[t]he power of declaring war is not only the highest sovereign prerogative; but it is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. War, in its best estate, never fails to impose upon the people the most burthensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing, and agricultural interests. Nay, it always involves the prosperity, and not unfrequently the existence, of a nation. It is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead; and *in a republic, whose institutions are essentially founded on the basis of peace, there is infinite danger that war will find it both imbecile in defense, and eager for contest.* Indeed, the history of republics has but too fatally proved, that they are too ambitious of military fame and conquest, and too easily devoted to the views of demagogues, who flatter their pride, and betray their interests.

J. Story, *Commentaries on the Constitution of the United States*, 89-90 (2nd ed. 1851).

D. *Defendant is not Premature in Challenging the Legality of the Vietnam War.*

In *Mitchell v. United States*, 369 F.2d 323 (2d Cir. 1966), *cert. den.*, 386 U.S. 972 (1967), the Court held that one who had refused to submit to induction was not premature in challenging the legality of the Vietnam war.

However, the Court in *Mitchell* held, without citation of authority, that illegality of the war was no defense because,

"Regardless of the proof that appellant might present to demonstrate the correlation between the Selective Service and our nation's efforts in Vietnam, . . . the congressional power 'to raise and support armies' . . . is a matter quite distinct from the use which the Executive makes of those . . . have been inducted into the Armed Forces." 369 F.2d 323, 324. (Emphasis added)

Surely that cannot be the law. Under Title 50 App. § 454(a), "The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces . . . such number of persons as may be required. . . ." The important fact which the *Mitchell* Court refused to recognize is that the power to raise armies has been delegated by Congress to the President, so that the President determines the manpower quotas which the local boards (including defendant's local board) are required to meet, and it is the President who then uses this manpower. The powers may in law be distinct, but they are in fact exercised by the President, and the issue is whether the power to induct is being used for the purpose of waging an illegal war. The Supreme Court not infrequently has invalidated a statute because of its purpose and effect. See e.g. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Griffin v. County School Board of Prince Edwards County*, 377 U.S. 218 (1964); *Bickel, The Least Dangerous Branch*, 208-221 (1962). Here, the simple and sufficient allegation is that an otherwise valid statute is being abused to accomplish an illegal end.

One technical point may be worth mentioning: the *Mitchell* case is distinguishable on its facts from the case at bar. In *Mitchell*, the defendant did not even report to the induction station, whereas the defendant herein did report—thereby giving the army the opportunity to reject him.

In *The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 Kan.L.Rev. 449 (1968), Lawrence R. Velvel argues persuasively that the ordinary taxpayer has standing to challenge the legality

of the Vietnam war even under the decision of *Frothingham v. Mellon*, 262 U.S. 447, 448 (1923). Velvel rests his conclusion on the decisions in *Doremus v. Board of Education*, 342 U.S. 429, 434-5 (1952); *Everson v. Board of Education*, 342 U.S. 485 (1952); *Wieman v. Updegraf*, 344 U.S. 183 (1952); *Baker v. Carr*, 369 U.S. 186 (1962); *NAACP v. Alabama*, 357 U.S. 449, 458-60 (1958); *Barrows v. Jackson*, 346 U.S. 249, 255-59 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); and *Flast v. Cohen*, 392 U.S. 83 (1968). Velvel estimates that the Vietnam war is costing each citizen 100 to 125 dollars each year. It would be anomalous if as a taxpayer or citizen defendant had standing to challenge a war which deprived him of 100 dollars, but as an eligible draftee he could not challenge the same war which threatened to deprive him of his liberty.

It would indeed be anomalous if the power of judicial review was utilized to invalidate an order of the President taking property, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1951), but the same protection denied where an order of the President takes the liberty of an individual. In the *Estep* case, Mr. Justice Murphy remarked: "This principle [judicial review] has been applied many times in the past for the benefit of corporations . . . (Citations omitted) I assume that an individual is entitled to no less respect." 327 U.S. at 127.

It would be anomalous if parties are entitled to declaratory relief in a variety of situations, despite the absence of a threat of enforcement of the statute of which they complain, [e.g. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Adler v. Board of Education*, *supra*; *Currin v. Wallace*, 306 U.S. 1 (1939); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Pierce v. Society of Sisters*, *supra*; and *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923)], but defendant, who is clearly threatened, not permitted to defend his liberty by establishing the unconstitutionality of the statute which threatens him.

Moreover, as Mr. Justice Frankfurter stated in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 156 (1951):

"If the ultimate impact of the challenged action on the petitioner is sufficiently probable and not too distant, and if the procedure by which that ultimate action may be questioned is too onerous or hazardous, '*standing*' is given to challenge the action at a preliminary state." 341 U.S. 123, 156 (Emphasis added).

That formula fits defendant precisely: the impact of the Vietnam war on defendant is certain and immediate, and requiring defendant to join the military would be both onerous and hazardous in the extreme.

Hence, there are abundant reasons for agreeing with the *Mitchell* Court that the defense of the illegality of the Vietnam war, if it be a defense, is not premature when raised by a defendant accused of refusing to obey an induction order.

Further reasons could be conceived. By analogy to the doctrine of pendent jurisdiction, e.g. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), the Court should exercise its discretion to hear all defenses which entail related factual issues. Defendant clearly has standing to defend on the ground that peace-time conscription is unconstitutional, and that defense requires a legal/factual determination as to whether conscription may be used to provide manpower for the Vietnam conflict, viewing the conflict as an undeclared war or viewing the conflict as a war in violation of international law. Similarly, defendant unquestionably has standing to show that he reasonably believed the war to be illegal, and that defense is based on facts tending to show that a reasonable man could view the Vietnam war as illegal. Again, defendant has standing to defend on the basis of his constitutional right of conscience, and this defense requires a showing that the right of conscience is violated by compelling military service in an illegal war.

Further buttressing defendant's effort to challenge the legality of the Vietnam war at this time is the fact that defendant would forfeit several of the defenses which he is entitled to raise at this time (in addition to the defenses described in the preceding paragraph, there may



be a number of technical defenses touching defendant's classification procedure) if he permitted himself to be inducted. There is no justification for requiring defendant to choose certain defenses and waive others. Defendant is entitled to raise all possible defenses in connection with this prosecution.

## CONCLUSION

The question of defendant's standing to obtain an adjudication of the legality of the Vietnam war is not without difficulty. But the difficulty is attributable, not to the technical requirements of standing, but to the merits of the defense. Defendant amply meets the technical requirements: as a criminal defendant, he has the requisite interest and is entitled to raise all defenses; the facts relevant to the legality of the Vietnam war are as developed now as they can ever be; defendant would have no opportunity to litigate the legality issue in the military; defendant has standing to raise certain defenses at this time which would be waived if he joined the military; and defendant has standing to present various defenses at this time which are related to the defense based directly on the illegality of the Vietnam war.

The difficulty lies in the merits, but it is a difficulty which must be resolved in favor of adjudicating the legality of the Vietnam war. It must be so resolved to preserve the function of the judiciary, not only to safeguard the constitutional rights of individuals, not only to keep the military subservient to the civilian institutions in our society, not only to guard against encroachment by the Executive branch into the powers reserved for the Legislative branch of our government, not only to do justice by subordinating executive and legislative action to the supremacy of law, but also by legitimizing the lawful acts of the executive and legislative branches.

Respectfully submitted

/s/ John G. S. Flym  
JOHN G. S. FLYM



UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

GOVERNMENT'S MEMORANDUM OF LAW

- I. *This Court Has No Jurisdiction To Examine Questions Concerning The "Legality" Of The Viet Nam Conflict, Because The Exercise Of Executive And Legislative Powers, In The Context Of The Instant Case, Is Not Subject To Judicial Examination.*

The contentions which defendant would raise are political issues involving the Executive's discretionary guidance of this nation's foreign policy, aided by the Congress in its appropriate Constitutional spheres. As such, these contentions are not subject to examination by this Court.

The Courts have consistently recognized the division between their functions and those of the Executive and Legislative branches of the Government. As early as 1803, the Supreme Court stated in *Marbury v. Madison*, 5 U.S. 87, 1 Cr. 137 (1803):

By the Constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. (5 U.S. at 104, 1 Cr. at 165-166)

And *Marbury* states the role of the judiciary to be:

to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. (5 U.S. at 107, 1 Cr. at 170)

The defendant seeks to challenge, by way of defense, the wisdom of this country's engagement in foreign affairs, the propriety of its international decisions, and the constitutionality of its actions in this field. But such matters fall completely within the ambit of the traditional legal doctrine of the "political question," over which the judiciary has no jurisdiction.

In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court enunciated the "political question" doctrine (at page 217):

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The matters which defendant seeks to raise fit squarely within this formulation of the non-justiciable "political question". The presence of American troops in Viet Nam is a matter of foreign policy, the setting of which policy the Constitution has committed to the Executive Branch and Congress according to their respective Constitutional responsibilities. Whether, and to what extent, our forces should be deployed in that troubled area is a question which cannot be answered by judicially discoverable standards; rather, it is impossible of resolution "without an initial policy determination of a kind clearly for non-judicial discretion". With all due deference, for the Court to attempt an independent resolution of the issue, would express a "lack of the respect due coordinate branches of government".

Concerning judicial intervention in the delicate and discretionary area of foreign policy, the Supreme Court said in *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948) (at page 111):

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.<sup>1</sup>

In affirming the dismissal of a suit which had been brought by an Army private to enjoin the Secretary of

<sup>1</sup> Citing *Coleman v. Miller*, 307 U.S. 433 (1939); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918). See also *Williams v. Suffolk Ins. Co.*, 38 U.S. 357, 13 Pet. 415 (1839); *Eminente v. Johnson*, 361 F.2d 73 (D.C. Cir., 1966); *cert. denied* 385 U.S. 929 (1966); *Pauling v. McNamara*, 331 F.2d 796 (D.C. Cir., 1963), *cert. denied* 377 U.S. 963 (1964); *Pauling v. McElroy*, 278 F.2d 252 (D.C. Cir., 1960); *cert. denied* 364 U.S. 835 (1960); *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir., 1959), *cert. denied* 361 U.S. 918 (1959).

The analogy from the international forum of the United Nations is instructive. Questions concerning the legality of military actions are considered by the Security Council, not a judicial but a highly political body.

Defense and the Secretary of the Army from sending him to Viet Nam, on the grounds of the alleged unconstitutionality and illegality of the conflict there, the Court of Appeals for the District of Columbia Circuit said recently:

It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive. [Citing cases] *Luftig v. McNamara*, 373 F.2d 664 at 665-666 (D.C. Cir., 1967), *cert. denied*, *sub nom. Mora v. McNamara*, 389 U.S. 934 (1967).

## II. *Defendant In The Present Case Has No Standing To Raise The "Legality" Of The Viet Nam Conflict.*

Defendant clearly has standing in the present criminal proceeding to challenge the constitutionality of that Act and of its administration, but the defendant does not have standing to raise questions relating solely to questions concerning the "legality" of the present conflict in Viet Nam and the political and diplomatic causes and consequences of that conflict.

If an American soldier fighting in Viet Nam were given an illegal order, he would be directly affected thereby, and would perhaps have the requisite standing to raise the illegality of the order in defense to a prosecution for refusing to obey it. See *United States v. Bolton*, 192 F.2d 805 (2 Cir., 1951). But the defendant in the present case is far removed from such a position. See *Richter v. United States*, 181 F.2d 591 (9 Cir., 1950), *cert. denied* 340 U.S. 892 (1950).

- A. The existence of an armed conflict and the "legality" of that conflict do not bear upon the criminality of interference with the Military Selective Service Act of 1967 and with its administration.

Matters concerning the Viet Nam conflict, which defendant seeks to inject into these proceedings, do not bear upon the question of his guilt or innocence of the crime with which he is charged. The Military Selective Service Act of 1967 and its predecessors have been in existence since 1940, and have been amended several times since then. They have been administered, and violations of their provisions have been prosecuted, in peacetime as well as during periods of armed conflict. The power of Congress to conscript manpower for general military service is "beyond question". *United States v. O'Brien*, 391 U.S. 367, 377 (1968):

In *United States v. Mitchell*, 369 F.2d 323 (2 Cir., 1966), cert. denied 386 U.S. 972 (1967), the Second Circuit affirmed the conviction of a young man for wilful failure to report for induction into the armed forces. The defendant had attempted at trial to introduce evidence to show the Viet Nam conflict to be in violation of law. All such evidence had been excluded by the trial judge as immaterial. The Second Circuit Court of Appeals held (at page 324):

... appellant's allegations are not a defense to a prosecution for failure to report for induction into the Armed Forces and his evidence was properly excluded. Regardless of the proof that appellant might present to demonstrate the correlation between the Selective Service and our nation's efforts in Viet Nam, as a matter of law the congressional power "to raise and support armies" and "to provide and maintain a navy" is a matter quite distinct from the use which the Executive makes of those who have been found qualified and who have been inducted into the Armed Forces. Whatever action the President may order, or the Congress sanction, cannot impair this constitutional power of the Congress.



In a similar case, the Second Circuit affirmed a conviction for wilful failure to report for civilian work (alternative service). *United States v. Hogans*, 369 F.2d 359 (2d Cir., 1966). The Court there held (at page 360):

The Congressional power to provide for the draft does not depend upon the existence of a war or national emergency, but stems also from the Constitutional power to raise and support armies and to provide and maintain a navy. *United States v. Henderson*, 180 F.2d 711 (7th Cir., 1950). Accord, *Etcheverry v. United States*, 320 F.2d 873 (9th Cir.), cert. denied 375 U.S. 930 . . . (1963); *United States v. Bolton*, 192 F.2d 805 (2d Cir. 1951) (per curiam).

The courts will not examine the purpose for which the executive employs the armed forces in foreign military operations. *United States v. Bolton*, *supra*.

- B. Defendant cannot obtain standing to raise the "legality" of the Viet Nam conflict by attempting to show that he holds sincere philosophical, ethical or other beliefs concerning that conflict, based on "higher law".

The law is clear that a defendant's subjective notions of "higher law," no matter how motivated, cannot be the yardstick of criminal intent in the enforcement of Selective Service law.<sup>2</sup> *United States v. Madole*, 145 F.2d 466 (2d Cir., 1944); *United States v. Henderson*, 180 F.2d 711 (7th Cir., 1950), cert. denied 339 U.S. 936 (1950); *United States v. Kime*, 188 F.2d 677 (7th Cir., 1951); *United States v. Spiro*, 384 F.2d 159 (3d Cir., 1967), cert. denied 390 U.S. 956 (1968).

In affirming convictions for refusal to register for the draft, the Seventh Circuit said in *Henderson*, *supra*, at 716:

<sup>2</sup> The intent required by 50 U.S.C. App. 462(a) is the "usual criminal intent". *United States v. Hoffman*, 137 F.2d 416 at 419 (2d Cir., 1943); *Graves v. United States*, 252 F.2d 878 (9th Cir., 1958).

The final argument of the defendants is that none of the defendants had the criminal intent, which was necessary to a conviction. This argument scarcely deserves our consideration. Each of these defendants was a mature, young man, educated and intelligent. Each understood the law and what it required of him. Each deliberately decided not to meet its requirements, knowing that penalties were provided for non-compliance, and that such penalties might be meted out to him. As this Court said in *United States v. Mroz*, [136 F. 2d 221 (1943)] at page 226: "Appellant's clear and unqualified duty was to comply with his draft board's order. He can not 'take the law into his own hands' and render himself invulnerable to consequences. The draft machinery has been legally set up, and it is not for the individual to constitute himself judge of his own case." Each defendant here intended to, and did, deliberately violate the Act. That is sufficient to support his conviction.

PAUL F. MARKHAM  
United States Attorney

By:

JOHN WALL  
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

OPINION

November 25, 1968

WYZANSKI, Chief Judge

The grand jury indicted Sisson for willfully refusing to perform a duty required under the Military Selective Service Act of 1967, U.S.C. Tit. 50 App. §§ 451 et seq., in that he refused to comply with an order of his draft board to submit to induction into the armed forces of the United States.

He has moved to dismiss the indictment principally upon the ground that the draft act as applied to him violates the Constitution. He contends that there is under the Constitution of the United States no authority to conscript him to serve in a war not declared by Congress.

Intertwined are the issues as to whether Sisson has a standing to raise the question he poses and whether, indeed, it is authorized by the Constitution or contrary to its terms for him to be ordered to serve under the draft act at this time.

Two years ago those issues, while not squarely presented, were at least involved indirectly in the sentence I imposed upon Phillips, defendant in *United States v. Phillips*, Cr. 68-178-W. He claimed that the war in Vietnam was not duly authorized and that he could not be compelled to serve in it. In sentencing him I pointed out that he was unable to tell whether his service would involve any duties in Vietnam. So far as appeared, he might spend his total military service in the United States or in some foreign place other than Vietnam. I

implied, without definitely so ruling, that under the then existing circumstances he had no standing to question the military actions in Vietnam or to avoid induction on the ground that he might be involved in such actions.

Two major changes have occurred since the sentencing of Phillips.

First, it appears incontrovertibly that draft calls, that is, the number of persons summoned for military service under the Act, if not directly determined by military demands in Vietnam, are so closely correlated as to be unmistakably inter-dependent. Thus, the risk of being drafted, which each individual like Sisson sustains, is seriously magnified by the Vietnam war. This risk is different from the one which the individual taxpayer sustains by an increase in his taxes due to the swollen appropriations evoked by military demands in Vietnam. One reason is that the very person of the conscript is affected so that his whole life is altered. He is not merely inconvenienced by a fringe detriment to his pocketbook. What is perhaps even more significant is that *Selective Draft Law Cases*, 245 U.S. 368, decided in 1917 that a person drafted for military duty does have a standing to raise at least some issues with respect to the constitutionality of draft legislation. See particularly p. 389. Thus there is a difference from the dicta in *Flast v. Cohen*, 392 U.S. 83 which suggest that a person required to pay a federal income tax has no standing to challenge an act appropriating money to be spent in connection with Vietnam.

The other difference between the situation today and that two years ago is that previously it was plausible to suppose that one drafted under the Act could, subsequent to his induction and at the very point when he was in peril of being transferred to Vietnam, raise the issue as to whether he personally could constitutionally be required to serve in that war. In recent years, repeated opposition by the executive and military branches of the Government of the United States has led courts in a virtually unanimous series of opinions to conclude that a soldier cannot raise in a civilian court, or indeed in a military court, the issue as to the constitutionality

of his proposed transfer to Vietnam. Those cases may not represent the view which the Supreme Court of the United States will ultimately take. But it is indisputable that today there is no clear right of a soldier once he is in the armed forces to get a judicial ruling on the right of the Army to require him to serve in Vietnam. It follows that if there is to be a presently effective judicial review it must come at the point of induction and not later.

Faced with a defendant who has standing to raise the issue, this Court must inquire as to whether an order requiring service in the armed forces with a strong probability of ultimate service in Vietnam violates any provision of the United States Constitution so as to entitle the person so ordered to disregard the induction order. Put thus, the issue is somewhat deceptive. The court has a procedural, as well as a substantive, problem. It must decide whether the question sought to be raised is in that category of political questions which are not within a court's jurisdiction and, if the issue falls within the court's jurisdiction, whether as a matter of substance the defendant is right in his contention that the order is repugnant to the Constitution. Again, while those two aspects are technically separate, they are so close as often to overlap.

Four different types of cases may be noticed.

(1) A person may be required to give military service in connection with a war declared by Congress. *Selective Draft Law Cases*, *supra*.

(2) A person may be required to give military service in order to be ready to serve in a war that might later be declared by Congress. *Hamilton v. Regents*, 293 U.S. 245, 260; *United States v. O'Brien*, 391 U.S. 367, 377.

(3) There is no Supreme Court case deciding whether a person who has been conscripted in time of peace may be required during his service to respond to an order to fight abroad pursuant to a direction of the President, either as Chief Executive or as Commander-in-Chief, wholly unsupported by any Congressional authority but evoked by an emergency. It is important to note that



the third hypothetical case is not the present case. The third case, for which, as shown in the June 1968 Harvard Law Review Note on Congress, *The President, and The Power to Commit Forces to Combat*, 81 Harv. L. Rev. 1771, there are many Caribbean and other precedents, has as its central characteristic that the President has to act quickly and in an emergency assigns to battle in foreign areas men in the armed forces whether they are volunteers or conscriptees.

Without in any way deciding the point, it may be assumed that to meet the emergency the President need not wait for an Act of Congress and need not segregate those who were conscripted from others who volunteered. Indeed, one may further assume, for the sake of argument, that if the power rests upon emergency and the necessities thereby created, it is within the judicial power to scrutinize the length of time that the emergency may be permitted to serve as a constitutional rationalization for the action. See for possibly comparable cases Justice Holmes's opinion in *Chastleton Corp. v. Sinclair*, 264 U.S. 543, his opinion in *Moyer v. Peabody*, 212 U.S. 78, and Chief Justice Hughes's opinion in *Sterling v. Constantin*, 287 U.S. 378.

Making such assumptions does not imply that the assumptions are correct. Caution is invited by *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (holding invalid Presidential emergency action, see particularly p. 103) and *The Steel Seizure case*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, in President Truman's Administration (holding that executive action in an emergency even when closely connected with a foreign war was unconstitutional, perhaps partly because it seemed to circumvent a specific statute).

Moreover, as already observed, assumptions with respect to this third type of case are made merely for argument's sake, but do not purport to resolve authoritatively the highly debatable problem whether the issues as to whether emergency creates, or, as *Home Bldg. & L. Assn. v. Blaisdell*, 290 U.S. 398, phrases it, furnishes the occasion for the exercise of power and if so, and whether the emergency may last indefinitely, raise the

sort of political questions not appropriate for judicial determination.

(4) The fourth case is the instant controversy before this Court. It presents the question whether a conscript can secure from a court a determination that a war carried on for a long time without a declaration of war but as a result of combined legislative and executive action is a war in which, against his will, he can be required to serve.

A central characteristic of this fourth case, that is the case at bar, is that there has been no declaration of war. But it is an equally central characteristic that in the military steps, including the drafting and assigning of soldiers, the President has not acted alone.

Congress in 1967 extended the Selective Service Act, Pub. L. No. 90-40, 81 Stat. 100. Congress acted with full knowledge that persons called for duty under the Act had been, and are likely to be, sent to Vietnam. Indeed, in 1965 Congress had amended the same Act with the hardly concealed object of punishing persons who tore up their draft cards out of protest at the Vietnam war. See *United States v. O'Brien*, 391 U.S. 367.

Moreover, Congress has again and again appropriated money for the draft act, for the Vietnam war, and for cognate activities. Congress has also enacted what is called the Tonkin Gulf Resolution, which some have viewed as advance authorization for the expansion of the Vietnam war.

What the court thus faces is a situation in which there has been joint action by the President and Congress, even if the joint action has not taken the form of a declaration of war.

The absence of the formal declaration of war is not to be regarded as a trivial omission. A declaration of war has more than ritualistic or symbolic significance. What something is called has much to do with how authorities act and also with how those subject to authority respond. There is a vast difference between money exacted as a penalty for a crime and money exacted as compensation for a civil wrong. Judges require stronger evidence, and a far greater degree of certainty before assigning the badge of shame involved in a fine than when

they enter a judgment of civil liability for compensatory damages. The procedural and substantive standards differ. There is a roughly similar distinction between a declaration of war and a Congressional appropriation to support military action overseas directed by the President.

But the fact that a declaration of war is a far more important act than an appropriation act or than an extension of a Selective Service Act does not go the whole way to show that in every situation of foreign military action, a declaration of war is a necessary prerequisite to conscription for that military engagement.

We are reminded by *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, and its progeny, that the national government has powers beyond those clearly stipulated in the Constitution. That the Constitution expresses one way of achieving a result does not inevitably carry a negative pregnant. Other ways may be employed by Congress as necessary and proper. Indeed, the implied powers may be not only Congressional but sometimes Presidential. *In re Debs*, 168 U.S. 564. And this implication may be most justifiable in foreign affairs. *U.S. v. Curtiss-Wright Corp.*, 299 U.S. 304. What may be involved in the present case is a choice between a limited undeclared war approved by the President and Congress and an unlimited declaration of war through an Act of Congress. The two choices may find support in different, related, but not inconsistent Constitutional powers.

If the national government does have two or more choices there are readily imagined reasons not to elect to exercise the expressly granted power to declare war.

A declaration of war expresses in the most formidable and unlimited terms a belligerent posture against an enemy. In Vietnam it is at least plausibly contended by some in authority that our troops are not engaged in fighting any enemy of the United States but are participating in the defense of what is said to be one country from the aggression of what is said to be another country. It is inappropriate for this court in any way to intimate whether South Vietnam and North Vietnam are separate countries, or whether there is a civil war, or whether there is a failure on the part of the people in

Vietnam and elsewhere to abide by agreements made in Geneva. It is sufficient to say that the present situation is one in which the State Department and the other branches of the executive treat our action in Vietnam as though it were different from an unlimited war against an enemy.

Moreover, in the Vietnam situation a declaration of war would produce consequences which no court can fully anticipate. A declaration of war affects treaties of the United States, obligations of the United States under international organizations, and many public and private arrangements. A determination not to declare war is more than an avoidance of a domestic constitutional procedure. It has international implications of vast dimensions. Indeed, it is said that since 1945 no country has declared war on any other country. Whether this is true or not, it shows that not only in the United States but generally, there is a reluctance to take a step which symbolically and practically entails multiple unforeseeable consequences.

From the foregoing this Court concludes that the distinction between a declaration of war and a cooperative action by the legislative and executive with respect to military activities in foreign countries is the very essence of what is meant by a political question. It involves just the sort of evidence, policy considerations, and constitutional principles which elude the normal processes of the judiciary and which are far more suitable for determination by coordinate branches of the government. It is not an act of abdication when a court says that political questions of this sort are not within its jurisdiction. It is a recognition that the tools with which a court can work, the data which it can fairly appraise, the conclusions which it can reach as a basis for entering judgments, have limits.

Because defendant Sisson seeks an adjudication of what is a political question, his motion to dismiss the indictment is denied.

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Chief Judge

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

OPINION

November 26, 1968

WYZANSKI, Chief Judge

Defendant construes his motion to dismiss the indictment as including a contention that he is entitled to have the indictment dismissed on the ground that he is being ordered to fight in a genocidal war.

The issue of defendant's standing to raise the genocidal question and the issue whether the question is a question not within this Court's jurisdiction resemble the issues already considered by this Court in denying defendant's motion to dismiss the indictment on the ground that defendant has been ordered to fight in a conflict as to which Congress has not declared war. However, there are differences between the problems which the earlier motion presented and the ones now raised.

For argument's sake one may assume that a conscript has a standing to object to induction in a war declared contrary to a binding international obligation in the form of a treaty, in the form of membership in an international organization, or otherwise. One may even assume that a conscript may similarly object to being inducted to fight in a war the openly declared purpose of which is to wipe out a nation and drive its people into the sea. Conceivably, in the two situations just described, the conscript would have a standing to raise the issue and the court would be faced with a problem which was not purely a political question, but indeed fell within judicial competence.



The issue now tendered by this defendant is unlike either of the two cases just mentioned. At its strongest, the defendant's case is that a survey of the military operations in Vietnam would lead a disinterested tribunal to conclude that the laws of war have been violated and that, contrary to international obligations, express and implied, in treaty and in custom, the United States has resorted to barbaric methods of war, including genocide.

If the situation were as defendant contends, the facts would surely be difficult to ascertain so long as the conflict continues, so long as the United States government has reasons not to disclose all its military operations, and so long as a court was primarily dependent upon compliance by American military and civilian officials with its judicial orders. It should be remembered that the tribunal at Nuremberg, probably because it had a Russian judge, was unable to face up to the problems tendered by the Katyn massacres. Moreover, neither at Nuremberg nor at Tokyo, tribunals upon which an American judge sat, was there any attempt to resolve the problems raised by the nuclear bombing of Hiroshima and Nagasaki. It is inherent in a tribunal composed partly of judges drawn from the alleged offending nation that a wholly disinterested judgment is most unlikely to be achieved. With effort, self-discipline, and judicial training, men may transcend their personal bias, but few there are who in international disputes of magnitude are capable of entirely disregarding their political allegiance and acting solely with respect to legal considerations and ethical imperatives. If during hostilities a trustworthy, credible international judgment is to be rendered with respect to alleged national misconduct in war, representatives of the supposed offender must not sit in judgment upon the nation. An analogous path of reasoning must lead one to conclude that a domestic tribunal is entirely unfit to adjudicate the question whether there has been a violation of international law during a war by the very nation which created, manned, and compensated the tribunal seized of the case.

Because a domestic tribunal is incapable of eliciting the facts during a war, and because it is probably in-

capable of exercising a disinterested judgment which would command the confidence of sound judicial opinion, this Court holds that the defendant has tendered an issue which involves a so-called political question not within the jurisdiction of this Court. Cf. *U.S. v. Mitchell*, 369 F.2d 323, (2d Cir.).

The motion to dismiss the indictment is again denied.

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Chief Judge

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v. *et al.*

JOHN HEFFRON SISSON, JR.

ORDER

December 3, 1968

WYZANSKI, Chief Judge

This formal and binding order is a response to defendant's counsel's informal letter, dated November 27, 1968.

1. The Court declines to modify its opinion of November 26. As is plain from the opinion as a whole, the word "genocide" as used therein has not primarily a narrow technical significance but relates to the method of eliminating a population by "barbaric methods." Defendant's earlier brief invited a broad opinion covering the many supposed methods asserted to have been used by the United States in conducting the Vietnam war.

2. Defendant indicates that he "proposes to offer evidence bearing on whether Congress indeed has authorized the Vietnam war." Such a proffer is by this Order formally rejected, subject, *as is every provision of this Order*, to defendant's automatically saved exceptions. First, the offer is precluded by this Court's opinion of November 25. Second, the matter of Congressional action or inaction is not a fit subject of "evidence"; it is, like a statute or rule or the absence of such, a subject to which the attention of a judge is properly drawn by brief or argument, rather than by testimony to be submitted to the trier of fact.

3. Defendant states he intends to "introduce evidence showing that the Vietnam war violates binding international obligations in the form of a treaty, membership

in an international organization, or otherwise." Before announcing its ruling, this Court distinguishes two types of alleged violation. (1) An international treaty might forbid a particular type of domestic statute or rule. For example, a treaty between the United States and a foreign power might forbid the United States to collect tolls for the use of a certain canal. If in the face of the treaty, Congress enacted a statute exacting tolls from a shipowner using that canal, and a collector proceeded to collect such tolls from an unwilling shipowner, he could sue to recover the amount from the collector, and the Court would entertain jurisdiction, within its authorized limits, to hear the case and to determine if the collection were contrary to the treaty. But, it should be noted that the Court, consistently with what is stated in Paragraph 2 of this Order, would receive with respect to that issue briefs or like arguments referring to the statutes and rules and (except in a case where facts were determinative, as, for example, whether the ship entered the canal before the treaty became effective) would not permit evidence with respect to the supposed conflict to be submitted to the trier of fact. (2) An international treaty might forbid the United States to engage in "the use of force". If it is claimed that the United States is subject to such a treaty, or to any international obligation, which applies to activity in Vietnam and if it is further claimed that the United States is now engaged in the use of force in Vietnam, the issues sought to be posed are political questions. The reasons for that statement are at least implicit in this Court's opinion of November 26. That is, "a domestic tribunal is incapable of eliciting the facts during a war and . . . it is probably incapable of exercising a disinterested judgment." The question whether there is a "use of force" presents problems of definition and, more significantly, of application to complicated facts, many of which are hidden in the recesses of chancelleries and governmental bureaus of both the United States and foreign countries. Nothing short of an inquiry of a scale loosely comparable to the Nuremberg Trial could fairly uncover the dominant facts. The primary witnesses appropriate for such an investigation

would be not academic persons who have no first-hand observations, but would be participants, authors of and parties to diplomatic and other official documents and correspondence, and officials who had responsibility for action or non-action. At best, the academic experts would be appropriate (not as evidence but as sources of argumentative material) after such primary testimony had been offered. Nothing in defendant's counsel's letter of November 27, 1968 indicates that his tender of evidence would raise an issue of the first type—that is, roughly similar to the example of the canal tolls. Hence this Court rules that it has not received a sufficiently specific suggestion of a question of international law claimed to fall within its jurisdiction, and that what have been proposed are issues raising political questions not within its jurisdiction. This ruling applies to the points listed on pages 9 and 10 of defendant's first Memorandum of Points and Authorities.

4. Defendant states it "will offer evidence to show he reasonably believed the Vietnam war to be illegal." The indictment charges him with wilfully refusing to perform a duty under the Military Selective Service Act of 1967. U.S.C. Ti. 50 App. §§ 451 et seq. "Wilfully" as used in the indictment means intentionally, deliberately, voluntarily. If the Government proves defendant intentionally refused to comply with an order of his draft board, in accordance with the statute, to submit to induction, it is not open to defendant to offer as an excuse that he regarded the war as illegal, that is, contrary to either domestic Constitutional law or international law. Whatever may be the availability of the issues of political belief, good faith, and like innocent motivation as defenses to an indictment charging conspiracy, and whatever may be the requirement imposed upon a prosecution in a conspiracy trial to show bad faith or awareness of illegality, and whatever may be in a conspiracy trial the relevance of a contention that the defendants therein were exercising their political rights of free speech which, by virtue of the First Amendment to the Constitution, are not subject to laws made by Congress,—in a prosecution for wilfully refusing to obey an induction order,



evidence with respect to belief is admissible only to the extent it bears upon the issues of intent, as distinguished from motive or good faith.

5. Defendant states he will "offer evidence to show that he properly refused to be inducted on the basis of his right of conscience, both statutory and constitutional." That proffer may (or may not) mean that defendant is prepared to prove that he has a religious conscientious objection to the Vietnam war, although he has no such objection to every war. If that is his position, he is entitled to offer at least initially only before the judge (in the absence of the jury) such evidence in order to elicit a ruling whether his evidence tends to support his allegation of fact and then to elicit a ruling whether the First Amendment precludes the Congress from requiring one who has religious conscientious objections to the Vietnam war to respond to the induction order he received. If the Court rules favorably to defendant on the Constitutional issue of law, then both defense and prosecution are entitled to submit to the trier of fact evidence relevant to the question whether defendant indeed is a religious conscientious objector to the Vietnam war.

6. Defendant states he will "offer evidence to show that the Selective Service Act of 1967, and the regulations governing the administration thereof, violate the constitutional requirements of due process." The vagueness of this quotation is an obstacle to a definite ruling. If the meaning is that the text of a section of the statute or of a regulation which has been applied to defendant as one of the steps in connection with the order directing him to submit to induction is in violation of the Fifth Amendment, the appropriate way to present the challenge is by making, (either before or at the trial, when the statute or regulation is relied upon either by the prosecution or the defense,) an argument addressed to the judge, not to the trier of fact. If the meaning is that defendant alleges that, as a matter of fact, because of some step in the process of adopting a regulation, or because of some act or omission in applying a statute or regulation, the statute or regulation was applied to him in violation of the Fifth Amendment, then a pre-

liminary disclosure must be made to the judge for his ruling as to the admissibility of the factual evidence and, if the ruling is favorable to defendant, evidence on the point, whether offered by prosecution or defense, may under some circumstances be submitted to the trier of fact.

/s/ Charles E. Wyzanski, Jr.  
Chief Judge

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

**Criminal No. 68-237-W**

**UNITED STATES OF AMERICA**

**v.**

**JOHN HEFFRON SISSON, JR.**

**OPINION**

**December 11, 1968**

**WYZANSKI, Chief Judge**

In his memorandum of points and authorities at pages 9 and 10, defendant lists the following as being matters as to which he proposes to tender evidence:

“1. “The United States claim to be acting in “collective self-defense” on behalf of South Vietnam is contrary to the well-established meaning of the rule laid down in Article 51 of the United Nations Charter to define the situations in which the right of collective self-defense may be lawfully exercised.

2. The United States military intervention in Vietnam therefore also violates the fundamental prohibition of the use of force proclaimed in Article 2(4) of the Charter as a Principle of the United Nations.

3. The United States has refused for more than a decade to abide by the basic Charter obligation contained in Article 33(1) to seek the settlement of international disputes by peaceful means.

4. The United States has refused to make proper use of the elaborate machinery created by the Geneva Accords of 1954 for the purpose of preventing any improper developments in Vietnam. The United States, furthermore, abetted and supported the systematic disregard of these obligations by the Saigon regime.

5. The State Department contends that an armed attack by North Vietnam upon South Vietnam occurred before February 7, 1965, the date on which the United States started overt war actions. This contention itself implies that the use of force by the United States in Vietnam during the four-year period between 1961 and early 1965 was illegal. The State Department agrees with the position of this analysis that armed attack must have taken place to justify the use of force by the United States under the principle of 'collective self-defense.'

6. In February 1965, when the United States started war actions against North Vietnam, the United States formally declared that these war actions constituted reprisals. Under the rules of international law governing the right of reprisal, these war actions must be regarded as illegal reprisals.

7. The United States abetted the breach of the central provision of the Geneva Accords of 1954 by South Vietnam, namely, the obligation to hold nationwide elections under international supervision looking toward the reunification of the Southern and Northern zones of Vietnam under a single government.

8. The United States also contravened other basic provisions of the Geneva Accords of 1954 by fostering a foreign military build-up in Vietnam and by virtually bringing South Vietnam into a military alliance.

9. The presence of large United States military forces in South Vietnam and the introduction of military equipment into South Vietnam has violated those provisions of the Geneva Accords which prohibit any foreign military build-up in South Vietnam. This conclusion has been confirmed by findings of the ICC.

10. The war actions of the United States in South Vietnam are not authorized by the SEATO Treaty but, in fact, appear to be in violation of it.

11. Even if the United States were legally entitled to take war actions in Vietnam, its methods of war-

fare would still be illegal insofar as they have violated the rules and customs of warfare.'"

Defendant indicates that to support his contention he will offer the evidence of two academic persons of undoubted distinction: Richard A. Falk, Milbank Professor of International Law, Princeton University, and Stanley Hoffman, Professor of Government and International Law, Harvard University.

One of the important questions which this Court must consider is whether such undoubtedly expert persons are suitable as witnesses called to the stand to give testimony before a jury or other trier of fact.

Much misunderstanding of the theoretical basis of expert witnesses has followed from undoubted differences in practice in different courts.

1. Expert opinion may properly be cited by either trial or by appellate courts to support the reasonableness of an act passed by a legislature if that act is challenged under the due process or other clause of the Constitution. Mr. Brandeis, as he then was, in *Muller v. Oregon*, 208 U.S. 412, if he did not originate the use of expert opinion to support the reasonableness of a legislative act, at least deserves credit for making the practice respectable. But two points are to be noted. First, expert evidence of the Brandeis brief type is offered not from the witness stand, but from the counsel table as written argument. Second, the expert evidence is used to support the reasonableness of the legislation and is not used either to contradict it or to achieve a quite independent non-legislative judgment of fact. See Wyzanski, "A Trial Judge's Freedom and Responsibility", 65 Harv. L. Rev. 1281, 1295-1296.

2. Appellate and trial courts have on occasion utilized expert opinion not in support of a legislative judgment but to invalidate a legislative judgment on the ground that it was unreasonable. This was conspicuously true with respect to *Brown v. Board of Education*, 347 U.S. 483, in which expert opinion was used in the Supreme Court of the United States to invalidate local ordinances segregating school children according to race. This was a heterodox step because some of the authorities relied



upon by the Supreme Court of the United States were, so far as appears, persons whose expert testimony was not given at the trial stage to the judge or to the jury and, to a large extent, was not included within the materials formally submitted as briefs by the opposing parties. Note, *Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to the Courts*, 61 Harv.L.Rev. 692, 697, note 43. Wyzanski, *supra*, p. 1296. Whether a different method justifies the use of expert opinion to invalidate a statute presents problems not now considered.

3. A trial court may properly accept expert testimony with respect to certain types of primary facts which have already been admitted in evidence as testimony by witnesses who themselves made relevant observations of primary facts. The applicable general rules are admirably restated in the A.L.I. *Model Code of Evidence*, ch. V, §§ 401-410, which reflects an independent re-examination of 2 *Law and Contemporary Problems* 401-527, 2 Wigmore, *Evidence* (3d ed. 1940) § 563, and a Uniform Act proposed in 1937 by the National Conference of Commissioners on Uniform State Laws. A common case in the trial courts is where a doctor is called to testify as to his expert medical opinion as to whether the primary facts already in evidence support an inference of causation or support a particular diagnosis or prognosis. Perhaps the most extreme example of expert medical testimony so far sanctioned was the ruling by Judge Goddard in the second trial of *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y.) permitting Dr. Binger and Dr. Murray to express a psychiatric opinion of the credibility of the witness Whittaker Chambers. A more familiar use of expert opinion is where an expert real estate appraiser testifies in a valuation case as to his opinion of the value of property, the characteristics of which have been independently proved either by his or other persons' observations.

4. A closer case which commonly arises in the trial court involves the testimony of an expert in patent cases. Probably because most judges find the subject of patents difficult to understand, and because the question of in-

vention is a mixed question of fact and of law, it is usual for the parties in a patent infringement litigation to offer expert testimony which goes beyond a description of what has been observed and which tends in most instances to involve an opinion on such questions as the amount of advance over the prior art. Such questions involve not merely observations and factual inferences, but mixed factual and legal conclusions or steps in the process of such conclusions.

5. A variety of the preceding situation with respect to patents is the use by a trial judge of a court-appointed expert who undertakes, almost like a master, to review the whole of the evidence offered or to be offered by the plaintiff and the defendant and to express as a witness on the stand his opinion, subject to cross-examination, as to whether the patent is valid and whether it has been infringed. See A.L.I. *Model Code of Evidence*, §§ 405-407. My own experience in the unreported case of *McMillan Laboratory, Incorporated v. Emerson and Cuming, Inc.*, (D. Mass.), C.A. 58-617-W, is recited in Wyzanski, "The Law of Change", *New Mexico Quarterly*, Spring 1968, pp. 19-20.

6. With respect to copyright cases, proper practice permits a party to put on the witness stand, before the jury or other trier of fact, an expert to aid the trier of facts to analyze supposed similarities between the copyrighted work and the alleged infringing work. *Arnstein v. Porter*, 154 F.2d 464, 484 (2d Cir.). But it is improper to permit the expert to testify as to illicit copying or unlawful appropriation. *Ibid.* Even where it is proper to allow expert testimony on supposed similarities, the matter may be so obvious, to the trier of facts, either as to similarities or dissimilarities, (the usual situation with regard to literature though often not as to music,) that sound policy leads a judge, as a matter of discretion, to reject expert testimony and to permit the expert opinion to appear only as part of and as a source of counsel's argument. *Nichols v. Universal Pictures Corporation*, 45 F.2d 119, 122 (2d Cir.); *Burns v. Twentieth Century-Fox Corporation*, 75 F. Supp. 986 (D. Mass.). Judge Learned Hand, perhaps the wisest and most experienced

of copyright judges, said in the *Nichols* case at p. 122, where there had been protracted use of expert testimony,

"We cannot approve the length of the record, which was due chiefly to the use of expert witnesses. Argument is argument whether in the box or at the bar, and its proper place is the last. The testimony of an expert upon such issues, especially his cross-examination, greatly extends the trial and contributes nothing which cannot be better heard after the evidence is all submitted. It ought not to be allowed at all; and while its admission is not a ground for reversal, it cumpers the case and tends to confusion, for the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naive, ground of its considered impressions upon its own perusal. We hope that in this class of cases such evidence may in the future be entirely excluded, and the case confined to the actual issues; that is, whether the copyrighted work was original, and whether the defendant copied it, so far as the supposed infringement is identical."

7. In the instant case, defendant seeks to argue before a jury what is essentially a question of law, that is, whether the actions of the United States executive and military authorities are a breach of international obligations undertaken by the United States in the form of treaties, or memberships in international organizations, or other arrangements having the force of international law. It would be entirely too clear for argument that this is entirely improper (see Thayer, *A Preliminary Treatise on Evidence*, p. 202; *Commonwealth v. Sullivan*, 146 Mass. 142; for a comment on *Sullivan* see Mark DeWolfe Howe *Justice Oliver Wendell Holmes*, Vol. II, p. 200) were it not for a suggestion which has recently gained currency (see Joseph L. Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, *The Yale Review*, Vol. LVII, June 1968, No. 4, p. 481) that in criminal law cases of a certain type, particularly those which raise issues of constitutional liberty, the defendant has the right to address not merely the judge, but also the

jury in order to get the jury's view of constitutional law. The contention is, in effect, that just as in libel law as a result of Fox's Libel Act, juries were permitted to acquit a defendant if they believed that as applied to him the law was unfair, or if they did not like the view of the law given by the judge in his charge to the jury, so in constitutional cases involving civil liberty a jury should have a right on their unfettered view of the law to acquit the defendant. Up to now it has not been thought that today in the United States Courts it is appropriate for a jury, even in a constitutional case, to have any concern with the law, except to apply it as instructed by the judge. *Sparf and Hansen v. United States*, 156 U.S. 51. The history of the topic is brilliantly surveyed by Mark DeWolfe Howe in *Juries As Judges Of Criminal Law*, 52 Harv. L. Rev. 582. Of course, we all know that in certain cases where political issues run high, juries in the privacy of the jury room vote their political convictions and disregard a judge's instructions. As Judge Learned Hand said in *United States v. Adams*, 126 F.2d 774, 775-776 (2d Cir.),

"... The institution of trial by jury—especially in criminal cases—has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions. A trial by any jury, however small, preserves both these fundamental elements and a trial by a judge preserves neither, at least to anything like the same degree."

In this case defendant is seeking, by tendering Professors Falk and Hoffman as witnesses, to broaden the

defenses available in a trial which has constitutional implications. He seeks precisely the same latitude that in the 18th Century Erskine and Fox did in libel law. But if any such latitudinarian position is to be taken, it surely first should be sanctioned by the Supreme Court of the United States and not introduced into the law by a district judge.

/s/ Charles E. Wyzanski, Jr.  
Chief Judge



UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

MOTION FOR AMENDMENT TO INCLUDE STATE-  
MENT PRESCRIBED BY 28 U.S.C. § 1292 (b) IN  
CERTAIN OPINIONS AND AN ORDER DENYING  
DEFENDANT'S MOTION TO DISMISS

In accordance with the provisions of rule 5(a) of the Federal Rules of Appellate Procedure, defendant herein moves that the Court amend its opinion dated November 25, 1968, its opinion dated November 26, 1968, paragraph 3 of its order dated December 3, 1968, and its opinion dated December 11, 1968, to include a statement that the issues there determined by the Court involve controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal with respect to said issues may materially advance the ultimate termination of this proceeding.

Respectfully submitted

/s/ John G. S. Flym  
JOHN G. S. FLYM  
Attorney for Defendant

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

## DEFENDANT'S MOTION CONCERNING VOIR DIRE

Pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure, defendant moves this Court to permit counsel to interrogate the prospective jurors concerning the following matters and other related matters, or in the alternative, to examine the jury panel as follows:

1. Do you or any member of your family know the attorney for the United States in this case, \_\_\_\_\_?

2. Do you or any member of your family know any of the following persons who worked on the investigation of this case? (The defendant asks that the government list the FBI agents and others who worked on the investigation.)

3. Do you or any member of your family know the following persons who are prospective witnesses in this case? (Defendant requests the court to ask the government to list the names of the witnesses whom it intends to call for the purposes of examining the jurors to see if any of them or any members of their family know the witnesses.)

4. Do you or any member of your family know any employee of the Federal Bureau of Investigation?

5. Do you or any member of your family know anybody who works for the United States Department of Justice, or as a prosecutor?

6. Have you heard or read anything about this case, in which the defendant is charged with refusal to submit to induction into the military services? If so, how did you gain this knowledge? Through newspapers and maga-

zines? radio? television? discussion with family, friends or acquaintances?

7. Have you ever heard anyone else express an opinion about the defendant, John Heffron Sisson, Jr., or about this case?

8. Have you ever in any place or at any time expressed an opinion about the defendant or about this case?

9. If you sit on the jury in this case, under your oath as juror, you will be required to focus your attention exclusively on the charges brought in the indictment here and the evidence offered by the prosecution and the defense and received in this courtroom. Do any of you feel that you will be unable to judge the facts of this case solely upon the basis of the evidence presented here in this courtroom and in accordance with the instructions of the law given by the court?

10. Do you, or does any member of your family, know anybody who is or has been a member of the military? Have any of you been in service? (If yes, give details: rank, theater of service.)

11. Have you ever served on a criminal jury? If so, how many times?

12. Have you ever been a witness for the government before a grand jury, or in the trial of a criminal case?

13. Would any of you place greater credence, or give greater weight, to the testimony of government agents or employees as contrasted with the testimony of persons not employed by the government?

14. Specifically, would you place greater credence in, or give greater weight to, testimony of members of the Federal Bureau of Investigation, or the Metropolitan Police, or the military, than to the testimony of persons not so employed?

15. Are you an employee of the United States government? If so, would you feel in any manner embarrassed in your employment or with your superiors if you were to return a verdict for the defendant, considering that the government is a party to this action?

16. Are you a member of or affiliated in any way with any law enforcement agency?

17. Is any member of your family employed by or affiliated with a law enforcement agency?

18. Are any of you convinced that no reasonable man could hold the view that the Vietnam War is wrong, or illegal, or unjustified, or immoral?

19. Are any of you convinced that a man who refuses induction into the military services necessarily must have a bad purpose or an evil intent?

20. There has been a great deal of publicity lately about the draft laws, and about criminal prosecutions of persons who are supposed to have violated the draft laws. Have you read anything about any of these cases? Have you expressed any opinion about any draft law cases? If so, what were the circumstances?

21. Is your state of mind such that you are opposed to or find fault with the following basic principles of our law:

a) The indictment is merely a charge. It is proof of nothing and no unfavorable inference may be drawn against a person because he is charged with a crime.

b) Anyone accused of crime is presumed innocent, which presumption continues even while the jury deliberates and entitles a defendant to be acquitted unless the jury finds that his guilt has been established beyond a reasonable doubt.

c) The burden is at all times upon the prosecution. Defendant has no burden of offering proof or of testifying in his own defense, and, even if he does not, no unfavorable inference may be drawn against him.

d) A defendant must be acquitted unless his guilt is established beyond a reasonable doubt by reliable, believable proof and not upon suspicion, guess or conjecture.

e) If your state of mind is such that you are opposed to any one or more of the basic principles of law (Nos. a-d), can you completely put aside and remove your own concept of the law and accept the court's instructions on the law in its entirety unbiased and unaffected by your previous concepts?

Respectfully submitted,

/s/ John G. S. Flym  
JOHN G. S. FLYM  
Attorney for Defendant

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Cr. No. 68-237-W

WYZANSKI, C. J.

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

APPEARANCES:

Stanislaw A. Suchecki, Esq., Assistant United States Attorney, attorney for the government.

John G. S. Flyn, Esq., attorney for the defendant.

Court Room No. 6,  
Federal Building,  
Boston, Mass.

March 21, 1969.

[fol. 2] The COURT. The Court will follow its normal practice, which it has followed for over 25 years, of doing the questioning of the jurors, in accordance with Chief Justice Taft's procedure. This is not an occasion for talk of any kind by any spectator. If there is any talk by any spectator, he will be told to leave the room and he may even be dealt with summarily in accordance with the authority of the court.

Please call the jury in connection with United States against Sisson. Will you call the defendant to the bar?

The CLERK. Criminal No. 68-237-W, United States of America against John Heffron Sisson, Jr.

The COURT. Is he here?

Mr. FLYM. Yes, your Honor, he is here.

The COURT. Please go to the usual place. You are a defendant; you are not a lawyer.

The DEFENDANT. Excuse me, I didn't know.

The CLERK. John Heffron Sisson, Jr., you are now set to the bar to be tried, and the good people whom I will call will pass between you and the United States of



America. If you object to any of them, please do so as they are called and before they are sworn.

The COURT: All right.

[fol. 3] The CLERK. 43, Justin McCarthy. No. 9, John T. Burns. No. 28, Clare G. Green. No. 37, Merle A. Lamont. No. 66, Robert Weiser. No. 1, Esther Alman. No. 6, Margaret Brooks.

The COURT. Margaret Brooks.

[No response.]

The COURT. Call another name.

The CLERK. No. 35, Mary Kelley. No. 68, Everett Williams, Jr. No. 15, Elaine Cribben. No. 3, Helen Barker.

The COURT. Will those persons who are in the jury box and all others called for jury duty please listen attentively. This is the trial of an indictment, United States of America against John Heffron Sisson, Jr. An indictment is a mere complaint or charge. It is in no sense evidence. It has been presented by a Grand Jury which never heard defendant's counsel and probably did not hear defendant or any of defendant's witnesses. It is a mere pleading.

The Grand Jury charges that on or about April 17, 1968, at Boston, in the District of Massachusetts, John Heffron Sisson, Jr. of Lincoln, in the District of Massachusetts, did unlawfully, knowingly and willfully fail and neglect and refuse to perform a duty required of him [fol. 4] under and in the execution of the Military Selective Service Act of 1967, and the rules, regulations and directions duly made pursuant thereto, particularly 32 Code of Federal Regulations, 1632.14, in that he did fail and neglect and refused to comply with an order of his local draft board to submit to induction into the armed services of the United States, in violation of Title 50 Appendix, United States Code, Section 462.

If any of you know John Heffron Sisson, Jr. or his counsel, John G. S. Flym, or know the United States Attorney, Mr. Markham, or his assistant, Mr. Suchecki, or his assistant, Mrs. Brennan, or know anyone else in the Department of Justice, including the FBI, or know any-

body on the Lincoln draft board, please hold up your hand.

If you know anything about this case, having seen anything in a newspaper about it, or have heard anything of it over the radio or on TV or in any way hold up your hand.

If you know of any reason why you, because of your own or any member of your family's interest in Selective Service matters, might have a bias with respect to this case, either for or against the defendant or the Government, hold up your hand.

[fol. 5] If you have at any time expressed any opinion with respect to the Constitutionality, legality or similar considerations with respect to service in the draft, in Vietnam, or otherwise, hold up your hand.

If you feel that there is any mental or other condition, any attitude of mind or otherwise, which would make you incapable of rendering a verdict according to the law and the evidence in this case, please hold up your hand.

Is there anything else, gentlemen?

Mr. FLYM. May I approach the bench, your Honor?

The COURT. Yes.

[Conference at the bench between Court and counsel as follows:

Mr. FLYM. I believe in reference to the first question Juror 2 had some doubt.

The COURT. Juror No. 2, did you express an opinion?

JUROR BURNS. I wasn't sure I understood. I know a United States Marshal.

The COURT. Do you know the present United States Marshal?

JUROR BURNS. Yes, sir.

The COURT. What is his name?

JUROR BURNS. Billy Baldwin.

[fol. 6] The COURT. He is not the United States Marshal.

JUROR BURNS. He is a Marshal though.

The COURT. Well, he is an assistant.

Is that any ground for you to challenge?

Mr. FLYM. No, your Honor. I didn't know.

[End of conference at the bench.]

[fol. 7] The COURT. All other persons called for jury duty are excused until Monday at ten o'clock. You are excused.

I will name a Foreman now. Mr. Weiser, will you act as Foreman of this jury. Please change places with No. 1.

Will you swear the Foreman and then swear the others? As far as I am concerned, the spectators may move to the most comfortable position they can find in the courtroom.

The CLERK. Mr. Foreman, please raise your right hand. Do you solemnly swear that you will well and truly try the issue between the United States and the defendant at the bar according to the law and the evidence given you, so help you God?

The FOREMAN. I do.

The CLERK. Will the balance of the panel please stand up? Please raise your right hand. Do you severally solemnly swear that you will well and truly try the issue between the United States and the defendant at the bar according to the law and the evidence given you, so help you God?

[The jury replied: I do.]

The COURT. You may proceed.

Mr. SUCHECKI. Thank you, your Honor. May it [fol. 8] please the Court, Mr. Foreman and members of the jury. As you have heard, this is the case of United States v. John Heffron Sisson, Jr. of Lincoln, Massachusetts, who is charged in a one Count indictment, that on or about April 17, 1968, at Boston, in the District of Massachusetts, he did unlawfully, knowingly and willfully fail and neglect and refuse to perform a duty required of him under and in the execution of the Military Selective Service Act of 1967 and the rules, regulations and directions duly made pursuant thereto, in that he did fail and neglect and refuse to comply with an order of his local draft board to submit to induction in the armed forces of the United States of America.

Now what will be the Government's proof in this case? The Government will prove that John Heffron Sisson, Jr. was subject to the provisions of the Selective Service Act, that is, he was in the age bracket between 18 and 26. Actually, John Heffron Sisson, Jr. was 18 years old and a student at Harvard College when he registered with the draft board.

The Government will prove that the defendant had been classified 1-A in accordance with the requirements of law. You will be able to find on the evidence submitted to you that the defendant was subject to the law-[fol. 9] ful and valid orders of his local draft board. You will be able to find that the defendant had been found acceptable for induction into the armed forces of the United States after a physical examination and a mental examination.

You will be able to find that the defendant failed, neglected and refused to perform a duty required of him in that he failed, neglected and refused to comply with an order made by his local board to submit to induction into the armed forces.

You will be able to find that this order was made with his knowledge, that is, he knew that order had been given to him, and he knew that he was not complying with it. This was not something that happened without his knowing about it.

You will be able to find that the defendant in failing to submit to induction did this under circumstances where he could exercise his free will and free choice. You will be able to find in effect that he intentionally and purposefully did not submit to induction. That is, not that he did not have a choice about the matter, but that he freely chose not to submit to induction, intentionally and purposefully.

Further, you will be able to find that he did this un-[fol. 10] lawfully. That is, without justification or excuse in the law for taking the action he freely chose to take.

Now what are the facts the Government submits will prove beyond a reasonable doubt that John Heffron Sisson, Jr. failed and neglected and refused to submit to

induction knowingly, willfully and unlawfully of an order to do so by a valid and lawful order of his local board?

The evidence will show that shortly after the defendant registered he was sent a classification questionnaire, which he completed and returned to his local board. The evidence will show that he received a student certificate from Harvard College and was classified 2-S by his local board on October 6, 1964, and for approximately three years after the defendant was classified 2-S.

The evidence will further show that on or about November 20, 1967 he was classified 1-A. The date is November 20, 1967. The evidence will show that when he was reclassified 1-A he was sent what is known as a Notice of Classification, a Form 110, containing all of his rights of appeal.

With that Notice of Classification, the evidence will [fol. 11] show that he was sent another form, Form 217, which was a letter in effect repeating what was already in the Notice of Classification, and this indicated all his rights to personal appearance and appeal.

In other words, the defendant had at least 30 days in which he could come in personally to his local draft board and appeal his classification to 1-A, and if he was still dissatisfied with the classification that was given him by his local board he had a right to appeal that classification, according to the regulations, under certain circumstances all the way to the President of the United States.

The evidence will show that this form was mailed to him on or about November 21, 1967. The mail that was sent to him was never returned to the local board as undelivered or undeliverable.

The evidence will further show that there was no appeal made by anyone within that 30-day period or any period.

The evidence will further show that on or about December 19, 1967 the local board mailed to the registrant his Order to Report for the armed forces physical examination on about January 12th of 1968.

The evidence will show also that the defendant ac-[fol. 12] knowledged the receipt of this Order to Report for the armed forces physical examination which was to



be held in Boston and stated he was leaving for Montgomery, Alabama, and he expected to be assigned to work in Mississippi.

The evidence will further show that in due course Mr. Sisson's papers were mailed to Local Board 27 in Jackson, Mississippi, and he was eventually examined physically and mentally, and he was found acceptable for induction into the armed forces.

The evidence will further show that on or about February 23, 1968 the examination papers were received by Local Board 114 and the board notified Mr. Sisson that he was found physically and mentally fully acceptable for induction into the armed forces.

On February 29, 1968 the defendant notified the local board he was conscientiously opposed to service in the armed forces. The evidence will further show that in due course the local board mailed the defendant a special form, which is to be filled out by a conscientious objector. This form, Form 150, the evidence will show, was never returned to the local board as undelivered or undeliverable, nor was it ever returned filled out by the registrant.

[fol. 13] On March 18, 1968 the defendant was ordered to submit to induction into the armed forces of the United States on April 17, 1968. The evidence will show that the defendant at the armed forces entrance and examining station, at the Boston Army Base, that day, April 17, 1968, refused to take the traditional step forward indicating his submission to induction.

After the Government has presented all of its evidence and you have had a chance to listen to all of the case, we respectfully submit you will be able to find that the Government has proved each and every essential allegation in the indictment and you will be able to find the defendant guilty as charged beyond a reasonable doubt.

The COURT. You may call your first witness. Did you want to say something?

Mr. FLYM. It was my understanding, your Honor, that the custom is for the defendant also to make an opening.

The COURT. It is not the custom. Never in my court in 27 years has it been done.

Mr. SUCHECKI. I would like to call to the stand Col. Feeney, please.

[fol. 14]

PAUL FRANCIS FEENEY, Sworn

*Direct Examination*

Q [By Mr. Suchecki] Would you please tell us your name, your rank and occupation, sir.

A Paul Francis Feeney, Colonel, Army of the United States, and I am the Deputy Director, Selective Service, for the Commonwealth of Massachusetts.

Q How long, sir, have you been assigned to the Selective Service System?

A For 19 years.

Q Did you, sir, bring some records at my request?

A Yes, sir.

Q And what records are those, sir?

A The Selective Service records of John Heffron Sisson, Jr.

Q Are these Government records, sir?

A Yes, sir.

Q Are these records kept in the regular course of business?

A Yes, sir.

Q Was it the regular course of business to keep such records?

A Yes, sir.

Q Were the entries made in these records at or about [fol. 15] the time indicated in them?

A Yes, sir.

Q And do you have custody and control of this file, sir?

A Yes, sir, I do.

Q Now, sir, would you please tell the members of the jury what first occurs in the Selective Service Process?

A Within five days following the 18th anniversary of the date of his birth every male citizen and every male residing in the United States, unless they are specifically

exempt from registration, must present themselves and register with the Selective Service System.

Q Do you find in the record before you, the official record, the registration card for John Heffron Sisson, Jr.?

A Yes, sir.

Q Would you please explain, sir, to the members of the jury what a registration card is and what its function is in the system?

A A registration card, Selective Service Form No. 1, is the basic record of all Selective Service procedures. It is the form that is completed at the time the individual presents himself and submits to registration under the Selective Service Law.

Q Is that the form you are holding in your hand, sir?

A Yes, it is.

[fol. 16] Mr. SUCHECKI. May this be marked Government Exhibit 1 in evidence?

The COURT. It is so admitted.

[Selective Service System Registration Card, Form No. 1-A, John Heffron Sisson, Jr., marked Government Exhibit 1 in evidence.]

Q Incidentally, sir, the complete Selective Service file we have subpoenaed through you, sir, was a copy of that file supplied to the defendant and his counsel?

A Yes, it was.

Q At the defendant's request?

A Yes, sir.

Q Now, sir, each registrant when he registers obtains what is called a Selective Service System Number, is that correct?

A That is correct.

Q Would you please explain, sir, to the members of this jury how that number is arrived at?

A The Selective Service Number is assigned by the registrant's local board. It is a four-element number, the first of which is the numerical designation of the State. The second element of the number is the numerical designation of the local board of jurisdiction. The third ele-

ment would be the last two digits of the registrant's year [fol. 17] of birth, and the fourth element of the number is the sequence in which that man was registered with that local board among men who were born in that particular year.

Q Now, sir, will you please tell us what the next step is that occurs in the processing of a Selective Service file.

A After the individual is assigned a Selective Service Number a registration certificate is prepared by the clerk of the local board and mailed to the registrant. Following this, the next step in the processing is the mailing to the registrant of a classification questionnaire.

Q Do you have in this file, sir, a copy of a classification questionnaire?

A Yes, I do, sir.

Mr. SUCHECKI. I submit this as Government Exhibit 2, if your Honor please.

The COURT. So admitted.

[Selective Service System Classification Questionnaire, Form 100, marked Government's Exhibit No. 2.]

Q This classification questionnaire has a form number, sir?

A Yes, Selective Service Form No. 100.

Q This was sent to John Heffron Sisson, Jr. by Local Board No. 114 on what date, sir?

[fol. 18] A July 2, 1964.

Q Is there a place on that form where it states when it was returned?

A It was received back at the local board on July 20, 1964.

Q Is this the form for the registrant to complete and return to the local board?

A It is.

Q Has part of this form been filled out by the Local Board No. 114 before it is sent out?

A Yes, it is.

Q Does this form bear the signature of the person who made it out?

A It does.

Q In this case whose signature appears?

A Agnes M. Grudinski, Clerk of the local board.

Q Her position is what, sir?

A Clerk of local board.

Q The form itself, when it was received, was it executed by John Heffron Sisson, Jr.?

A Yes, sir.

Q This form contains essential information about the registrant to aid in classifying him, is that correct?

A That is the purpose of the form, yes.

[fol. 19] Q This includes various bits of information, is that correct?

A Yes, sir.

Q Calling your attention to Series I IDENTIFICATION, what information did John Heffron Sisson, Jr. give in indentifying himself?

A His name, John Heffron Sisson, Jr. Other names used: None. Date of birth: May 14, 1946, in Boston, Massachusetts, in the United States of America. Current address: Trapelo Road, RFD No. 1, Lincoln, Middlesex County, Massachusetts. Telephone No: 259-8504. Social Security No: 032-34-8964. Name and address of person other than a member of my household who will always know my address: Dr. Warren R. Sisson, 20 Crafts Road, Chestnut Hill, Mass.

Q Did he also give a physical description of himself?

A Yes, sir.

Q What was that?

A Color of eyes: blue; color of hair: brown; height: 5' 11"; weight: 140 pounds.

Q He was a citizen of what country, sir?

A The United States.

Q Now, sir, is there any indication in Series II as to any military record in this questionnaire?

[fol. 20] A None.

Q Is there any indication that he has been previously married, as far as Series III is concerned?

A The block is checked "I have never been married."

Q Calling your attention to Series IV in the ques-



tionnaire, sir, the registrant listed his family, is that correct?

A Yes, sir.

Q Whom did he list, please?

A Father: Dr. John Heffron Sisson, Trapelo Road, Lincoln, Mass, age, 47. Mother: Barbara Blagden Sisson, Trapelo Road, Lincoln, Mass, age, 44. Sister: Emily Heffron Sisson, Trapelo Road, Lincoln, Mass, age, 17.

Q In Series V, sir, we have something called the occupation of the registrant. What did the registrant list as his occupation?

A Unemployed.

Q Were there any other entries in Series V, sir?

A With regard to Item 7, "My work experience prior to that described in Items 1 and 2, this series, is as a handyman for one summer."

Q He also put in some information about languages he spoke, is that correct, sir?

A He speaks fluently the following foreign languages or dialects: French. "I read and write well the following languages or dialects: French."

Q Now as to Series VI and Series VII, they were also left blank, is that correct?

A Yes, sir.

Q Calling your attention to Series VII, what does that refer to?

A Series VIII is the series devoted to conscientious objection.

Q Would you please read that to us, sir?

A "DO NOT SIGN THIS SERIES UNLESS YOU CLAIM TO BE A CONSCIENTIOUS OBJECTOR. I claim to be a conscientious objector by reason of my religious training and belief and therefore request the local board to furnish me a Special Form for Conscientious Objector (SSS Form No. 150)." There is a line for the registrant's signature. It is blank.

Q Now calling your attention to Series IX, sir, what does that describe?

A Series IX is the series devoted to the man's education.

Q What does that disclose, sir?

A It shows that at the time the questionnaire was completed the registrant had completed two years of college, majoring in Latin American Studies at Harvard [fol. 22] College, Cambridge. He had not received a degree and was presently a full-time student at Harvard majoring in Latin American Studies preparing for the Foreign Service and expected to receive a degree in June of 1966.

Q Going through the remainder of the form, Colonel, I believe Series X has been left blank, is that correct, sir?

A That is correct.

Q Series XI is also blank?

A Right.

Q In Series XII he indicated what, sir?

A No court record. He has no court record whatsoever.

Q And Series XIII?

A He is not a sole surviving son.

Q And, finally, there is the registrant's certificate. And has that been executed?

A It was signed John H. Sisson, Jr., July 13, 1964.

Q Now part of the classification questionnaire to which you have not referred yet is the part the registrant never sees formally, isn't that correct?

A Page 8 of the classification questionnaire is devoted to the minutes and actions of the local board. These entries are recorded by the local board.

Mr. SUCHECKI. You may inquire.

[fol. 23] *Cross-Examination*

Q [By Mr. Flym] Referring to Series VIII, you testified the registrant did not indicate he was a conscientious objector at the time he originally registered with the local board, is that correct?

A When he completed the questionnaire, sir.

Q When was the questionnaire completed?

A July 13, 1964.

Q When did he register with the local board?

A June 4, 1964..

Q So approximately a month elapsed between the registration and submission of this document?

A Right.

Q Would this preclude the defendant from subsequently filing a claim for C.O.?

Mr. SUCHECKI. Objection, your Honor.

The COURT. In view of Col. Feeney's authority, I will allow that question to be put because he has administrative authority to familiarize himself with it, and that makes him an expert. You may answer.

A May I have the question.

Q Would the fact that the registrant did not claim that he was a conscientious objector at the time he completed this form, Exhibit 2, preclude his subsequently filing a claim as a conscientious objector?

A No, sir.

Q He could do so a year later?

A Yes, sir.

Q Two years later?

A Yes, sir.

Q Four years later?

A Right.

Q Indeed the question would be at the time that he makes the claim that he is a conscientious objector whether he is then a conscientious objector, is that correct?

A He is not precluded from filing a claim at any time.

Q Yes. When he does file the claim, the question is not whether he was a conscientious objector at the time he filed this form, the question is whether he is a conscientious objector at the time that he makes the claim?

A Yes, sir.

Q You do not in the ordinary course of performing your functions, have occasion to review the documents in the registrant's file, do you?

A Yes, I do.

Q You do. What are those circumstances?

A There are many circumstances that would occasion my reviewing the records. If the registrant or a member of his family or his employer petitioned the State Director to intercede in the case, I would review it on that occasion. It is a standard practice that I would

review any appeal involving a claim of conscientious objection. I personally review all appeals to the Massachusetts Appeal Board. I personally review every record before an individual is reported to the United States Attorney. Those are some of the occasions on which I personally would review a file.

A In the ordinary course of events, if the registrant registers with his local board, and subsequently is ordered to report for induction and indeed reports, you would have no occasion to review his file?

A Under ordinary circumstances, no.

Q You testified that according to this form the defendant was scheduled to graduate from Harvard College in June, 1966?

A That is what it says here.

Q Assuming that fact to be accurate, you don't know that of your own knowledge?

A No, I don't.

Q You rely on the document for the information to which you testified?

[fol. 26] A That is correct.

Q Assuming that is a fact, that is, that he would graduate in June of 1966, and considering the state of the law as it was in 1966 prior to the enactment of the 1967 Act, and assuming that the defendant had registered for graduate school, would he have been entitled to a 2-S deferment?

Mr. SUCHECKI. Objection, your Honor.

The COURT. Sustained.

Mr. FLYM. No further questions.

The COURT. Is there any redirect examination?

Mr. SUCHECKI. No, sir.

The COURT. You are excused, Col. Feeney. Next witness.

Mr. SUCHECKI. Miss Grudinski.

AGNES MARGARET GRUDINSKI, Sworn

*Direct Examination*

Q [By Mr. Suchecki] Would you please give us your full name, M'am?

A Agnes Margaret Grudinski.

Q What is your occupation?

The COURT. Would you please spell your last name?  
[fol. 27] The WITNESS. G-r-u-d-i-n-s-k-i.

The COURT. Thank you.

Q What is your occupation?

A Executive Secretary.

Q How long have you been employed at Local Board  
No. 114 at West Concord, Massachusetts?

A Eighteen years.

Q And you are here subject to subpoena, are you not?

A Yes, I am.

Q And the subpoena requested that you bring the Se-  
lective Service file of one John Heffron Sisson, Jr., is  
that correct?

A That is correct.

Q And is that file presently before you?

A Yes.

Q And you are the custodian of this file?

A Yes, I am.

Q This is a regular Government record?

A Yes, it is.

Q And these records are made in the ordinary course  
of business?

A Yes, they are.

Q And it is the ordinary course of business to make  
such records?

[fol. 28] A Yes, it is.

Q And the entries in these records were made at or  
about the time reflected in them, is that correct?

A Yes.

Q Calling your attention specifically to Government  
Exhibit 2, the classification questionnaire, and calling  
your attention to the face of that questionnaire, who  
filled the upper half of that form out?

A I did.

Q Would you please tell us what you put on that  
form?

A I put the date of mailing, July 2, 1964, and John  
Heffron Sisson, Jr., Selective Service No. 19-114-46-137,



Trapelo Road, Lincoln, Middlesex County, Massachusetts, 01773.

Q Does your signature appear on that page?

A Yes, it does.

Q Calling your attention to the date of mailing, who filled that out?

A I did.

Q What is that date of mailing?

A July 2, 1964.

Q There is another line reading COMPLETE AND RETURN BEFORE—what date?

A July 13, 1964.

[fol. 29] Q And who filled that out?

A I did.

Q I also notice a stamp on the face of this questionnaire. What is the date of that?

A July 20, 1964.

Q What does that indicate?

A That indicates the date the questionnaire was returned to the local board.

Q Do you know who put that on there?

A Normal procedure it would be whoever was in the office.

Q Now do you know who John Heffron Sisson, Jr. is?

A Yes. I see him.

Q Do you see him in the courtroom today?

A Yes, I do.

Q Would you please point him out?

A Right over there.

Mr. SUCHECKI. Would you please stand, sir?

[The defendant rises.]

Q Is this the man, please?

A Yes.

Mr. SUCHECKI. Thank you, sir.

Q Now following this man's registration—you sent this classification questionnaire to him, is that correct?

[fol. 30] A After the registration, after the registration certificate is mailed, then of course the questionnaire is mailed.

Q What action did you take with regard to the registrant after you received this classification questionnaire from him, executed as it was?

A After I received it?

Q Yes, M'am.

A We date the time it is received and we put it in his sheet and record it in the classification book.

Q Then what happens?

A We file it away to be ready for the Board meeting.

Q Calling your attention to the minutes of the Board meeting that appear on the last page of this document, and calling your attention to on or about October 6, 1964, what happened at that time?

A On October 6, 1964 the local board classified John 2-S.

The COURT. It is very difficult to hear you.

Q Would you speak up a bit louder, M'am? The jury is straining very hard to hear you.

A On October 6, 1964 he was classified 2-S.

Q What does that mean?

A 2-S is student deferment.

[fol. 31] Q Student deferment?

A Yes.

Q What was the vote of the board on that day?

A Yes: three; No: zero.

Q There is an entry on that form dated October 7, 1964, "SSS Form 110 mailed to registrant." What does that mean?

A That is SSS 110, the Notice of Classification, notifying the registrant of his classification.

Q How long is a classification kept by the local board in normal practice, once a man is classified 2-S?

A Those are reviewed every year.

Q Reviewed every year?

A Yes.

Q Calling your attention to October 11, 1965, what happened on that date?

A He was reclassified 2-S.

Q And then on October 19th?

A He was mailed the 110 notifying him of his student deferment.

Q Calling your attention to June 17, 1966, there is an entry in the minutes. Would you please tell us what that entry is?

A That is "Form 223 mailed to registrant." That is [fol. 32] a Notice to Report for armed forces physical examination.

Q What happened to that, M'am?

A He didn't have to report for that because we received information from the school that he was still a student.

Q So as a student he was not required to report, is that correct?

A That is correct.

Q Calling your attention to November 7, 1966, what happened then?

A He was reclassified 2-S.

Q On November 8, 1966?

A SSS Form 110 mailed to registrant.

Q On June 19, 1967 what happened then?

A He was classified 2-A.

Q What does the 2-A mean?

A That is when the board receives notification he was going into the Peace Corps.

Q On June 20th, again?

A He was mailed the SSS Form 110, notifying him of his classification.

Q Finally, calling your attention to November 20, 1967, what happened then?

A He was reclassified 1-A.

Q On November 21, 1967 did you mail something out [fol. 33] to him on that day?

A Yes. The SSS Form 110 was mailed to him notifying him of his 1-A classification and Form 217 was mailed notifying him of his right to personal appearance and right of appeal.

Q Calling your attention to the file before you, do you have that advice of right to personal appearance and appeal in the file?

A Yes.

Mr. SUCHECKI. May this be marked Government Exhibit 3, if your Honor please?

The COURT. Admitted without objection.

[SSS Form 217, Selective Service System ADVICE OF RIGHT TO PERSONAL APPEARANCE AND APPEAL, marked Government Exhibit 3.]

Q Calling your attention to this form, who made that form out?

A I did.

Q And does your signature appear on that form?

A Yes, sir, it does.

Q In addition to that form, you mailed out, you said something else. What was it you said?

A SSS Form 110.

Mr. SUCHECKI. May this be marked Government Exhibit 4 for identification?

[fol. 34] The COURT. For identification only, yes.

[SSS Form 110, Selective Service System NOTICE OF CLASSIFICATION, marked Government Exhibit 4 for identification.]

Q Calling your attention to Government Exhibit 4 for identification, what sort of a form is that?

A Notice of Classification.

The COURT. I can hardly hear you. I think the jury must have the same difficulty.

A That is the Notice of Classification.

Q What is the form number?

A SSS Form 110.

Q Is that the SSS Form 110 or one similar to that form that you sent to John Heffron Sisson, Jr.?

A Yes, it is.

Mr. SUCHECKI. I ask that it be submitted into evidence, your Honor.

The COURT. Exhibit 4 for identification is now admitted as Exhibit 4.

[Government Exhibit 4 for identification received in evidence.]

Q Calling your attention to the—I believe the entry is—the first form you sent out was SSS Form 110?

A That is correct.

Q Would you please read to the jury—perhaps I bet-  
[fol. 35] ter read it.

Mr. SUCHECKI. I call your attention to this form, members of the jury. It has the following information on it—it lists on one part of the form the Selective Service Classification, the various classifications in which registrants may be registered. A Special Notice appears below the Selective Service Classifications and states: "A registrant who was deferred on or before his 26th birthday should ascertain from his local board if his liability has been extended to his 28th or 35th birthday. (See other side.)"

I also call to the attention of the jury the following information: NOTICE OF RIGHT TO PERSONAL APPEARANCE AND APPEAL. If this classification is by a local board, you may, within 30 days after the mailing of this notice, file a written request for a personal appearance before the local board (unless this classification has been determined upon such personal appearance). Following such personal appearance you may file a written notice of appeal from the local board's classification within the applicable period mentioned in the next paragraph after the date of mailing of the new notice of classification. If you do not wish a personal appearance but do want to appeal your case, you may do [fol. 36] so by making such an appeal in writing, to your local board, within the specified time.

Appeal from classification by local board may be taken by filing written notice of appeal with your local board within one of the following periods after the date of mailing of this notice:

(1) 30 days if the registrant is located in the United States, its territories, possessions, Canada, Cuba, or Mexico OR;

(2) 60 days if the registrant is located in a foreign country other than Canada, Cuba or Mexico.

You may file with your local board a written request that the appeal be submitted to the appeal board having jurisdiction over the area in which your principal place of employment or current place of residence is located.

If an appeal has been taken, and one or more members of the appeal board dissented from such classifica-



tion, you may file a written notice of appeal to the President with your local board within 30 DAYS after the mailing of this notice.

Your Government Appeal Agent, attached to your Selective Service local board, is available to advise you regarding your rights and liabilities under the Selective [fol. 37] Service Law.

Your Selective Service Number, shown on the reverse side, should appear on all communications with your local board. Sign this form immediately upon receipt.

FOR INFORMATION AND ADVICE, GO TO ANY LOCAL BOARD."

On the reverse side we have the Notice of the Selective Service System advising that you have been classified in accordance with the Selective Service Regulations, and these are set out on the opposite side, and they further tell you that when a subsequent Notice of Classification is received you should destroy the one previously received, retaining only the latest.

And then there are further regulations and notices, requiring the keeping of the registration card in the possession of the registrant.

Q Now in addition to this Form 110 you stated a Form 217 was mailed to the registrant; is that correct?

A That is correct.

Q And that is Exhibit No. 3.

Mr. SUCHECKI. I wish to call to the attention of the jury that in Exhibit 3 there is ADVICE OF RIGHT TO PERSONAL APPEARANCE AND APPEAL, in large letters, and the Notice does indicate that 30 days is given as the time in which this appeal may be made and it is [fol. 38] signed by Agnes M. Grudinski.

Q Was any appeal filed of this classification with the local board?

A No, there wasn't.

Q Did either one of the forms you mailed out at that time ever come back as undelivered or undeliverable?

A No, they did not.

Q What next of significance happened in this case?

A He was then mailed a Form 223 ORDER TO REPORT FOR ARMED FORCES PHYSICAL EXAMINATION.

Q Do you have that form, M'am?

A Yes, I have.

Mr. SUCHECKI. May this be a Government exhibit?

The COURT. Without objection it is admitted as Exhibit 5.

[SSS Form 223, ORDER TO REPORT FOR ARMED FORCES PHYSICAL EXAMINATION, marked Government Exhibit 5.]

Q After this form was mailed what next happened of significance in this case?

A We received a letter from the registrant saying he was going to Alabama.

Q Do you have a copy of that letter?

A Yes, I have.

Mr. SUCHECKI. May this be a Government exhibit, [fol. 39] if your Honor please.

The COURT. It is admitted without objection. Exhibit 6. May I see it, please?

[Letter dated December 26, 1967 from John H. Sisson, Jr. to Local Board No. 114, marked Government Exhibit 6.]

Q After this letter was received what next happened of significance in this case?

A We then received a TRANSFER FOR ARMED FORCES PHYSICAL EXAMINATION OR INDUCTION from Local Board No. 27, Jackson, Mississippi.

Q Does your signature appear on that paper?

A Yes, it does.

Mr. SUCHECKI. May this be a Government exhibit?

The COURT. Without objection it is admitted. Exhibit 7.

[SSS Form 230, TRANSFER FOR ARMED FORCES PHYSICAL EXAMINATION OR INDUCTION, marked Government Exhibit 7.]

Q After the Transfer Order was entered what next happened in this case?

A Then after the physical was completed we received the papers back from Mississippi.

Mr. SUCHECKI. May this be the Government's next exhibit?

The COURT. Admitted without objection. Exhibit 8. [fol. 40] [STATEMENT OF ACCEPTABILITY marked Government Exhibit 8.]

Q Following the receipt of this record, what happened in this case?

A Then the registrant's copy of SSS Form 62 was mailed to him.

Q Is there a copy of that Form 62 attached to that?

A Yes, there is.

Mr. SUCHECKI. Mr. Foreman and members of the jury, this is the STATEMENT OF ACCEPTABILITY. It states: SISSON, JOHN HEFFRON JR. Present home address: 900 North Parrish Street, Jackson, Mississippi. Selective Service No. 19-114-46-137. Local Board Address: LB 27, Jackson, Mississippi.

"The qualifications of the above-named registrant have been considered in accordance with the current regulations governing acceptance of Selective Service registrants and he was this date" and there is a cross placed in a space—"found fully acceptable for induction into the armed forces." The date of it is 1 February 68. Place: AFES Jackson, Mississippi. Typed or stamped name and grade of joint examining and induction station commander: Karl W. Scholz, Captain, AGC. The form number is DD Form 62.

[fol. 41] Q Is a copy of this form sent to the registrant?

A Yes, there is.

Q And that was done in this case?

A Yes, it was.

Q After this form was sent out, what next of significance happened in this case?

A On March 4th we received a letter requesting an SSS Form 150 claiming conscientious objection.

Q Do you have a copy of that letter?

A Yes, I have.

Mr. SUCHECKI. May I please enter this as a Government exhibit, your Honor?

The COURT. Without objection it is admitted. Exhibit 9.

[Letter dated February 29, 1968 from John H. Sisson, Jr. to Local Board No. 114, marked Government Exhibit 9.]

Q Following receipt of this letter at the local board what did you do?

A I completed the first part of the SSS Form 150 and mailed it to the registrant.

Q Do you have a copy of that form?

A We don't keep a copy of those.

Q Is that your normal procedure?

A Yes, it is.

[fol. 42] Mr. SUCHECKI. If your Honor please, may this be marked for identification?

The COURT. It may. Exhibit 10 for identification only.

[SSS Form 150, Selective Service System, Special Form for Conscientious Objector, marked Government Exhibit 10 for identification.]

Q I offer you this, M'am, as a sample of the form used in sending out forms usually sent out by the Selective Service System to conscientious objectors. Is that similar to the form you sent out to Mr. Sisson?

A Yes, it is.

Q What did you fill out on the form?

A It put the date of mailing, and after "COMPLETE AND RETURN BEFORE" I put the date there, and then I put John Heffron Sisson, Jr., his Selective Service Number and the mailing address.

Q This was mailed to him when?

A Mailed to him on March 4, 1968.

Q Was it ever returned to you as undelivered or undeliverable?

A No.

Q Was it ever returned to you as having been filled out as an application for conscientious objector status?

[fol. 43] A No.

The COURT. Without objection it is admitted as Exhibit 10.

[Government Exhibit 10 for identification received in evidence.]

Q Now calling your attention to the minutes of the Executive Board, could you tell us what next of significance happened in this case?

A On March 18, 1968 an ORDER TO REPORT FOR INDUCTION was mailed to the registrant.

Q Do you have a copy of that order?

A Yes, I have.

Mr. SUCHECKI. May this be the Government's next exhibit, please?

The COURT. It is admitted without objection as Exhibit 11. March 18, 1968, ORDER TO REPORT FOR INDUCTION. That is the order upon which this prosecution is based, is it not?

Mr. SUCHECKI. Yes, your Honor.

The COURT. Admitted.

[SSS Form 252, ORDER TO REPORT FOR INDUCTION, marked Government Exhibit 11.]

Mr. SUCHECKI. I call attention to the members of the jury that the Selective Service System ORDER TO [fol. 44] REPORT FOR INDUCTION states: "To: John Heffron Sisson, Jr., Post Office Box 457, Greenville, Mississippi 38701.

March 18, 1968.

Selective Service No. 19-114-46-137.

Greeting:

You are hereby ordered for induction into the Armed Forces of the United States, and to report at Local Board No. 114, 34 Commonwealth Avenue, West Concord, Mass. on April 17, 1968 at 6:45 a.m. for forwarding to an Armed Forces Induction Station.

Agnes M. Grudinski."

There are various notices as to previous Military Service, Social Security information, transportation information, etc.



It further states: "This Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any undue hardship if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared to continue your employment if you are not inducted. To protect your rights to return to your job if you are not inducted, you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your re-employment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this order subjects the violator to fine and imprisonment. Bring this order with you when you report."

This is SSS Form 252.

Q And this form was mailed to the registrant when?

A March 18, 1968.

Q What next happened in this case?

A The registrant reported.

The COURT. The registrant did report?

The WITNESS. He did report at the office.

Q And what happened there?

A Transportation was given to the registrant to get to the examining station.

[fol. 46] Q Did you see him that morning?

A Yes, I did.

Q And he took the bus and left?

A No. He took the train.

Q I'm sorry. He took the train and left.

Mr. SUCHECKI. You may inquire.

*Cross-Examination*

Q [My Mr. Flym] Miss Grudinski, I believe you testified that the defendant was classified 2-S; is that correct?

A Yes, he was.

Q What was the date?

A The first classification was October 6, 1964.

Q That was the classification, 2-S?

A Yes.

Q When was he classified 2-A?

A On June 19, 1967.

Q What was the basis of his being classified 2-A?

A Notification that he had made application and had been accepted for the Peace Corps.

Q Subsequently his classification was changed to 1-A, is that correct?

A After we got notification that he was no longer in the Peace Corps.

[fol. 47] Q When was that?

A October 6, 1967. We were notified he was terminated on September 22, 1967.

Q When was he reclassified 1-A?

A November 20, 1967.

Q Approximately three months later, I believe you testified, on February 29, 1968, you received a letter requesting an SSS Form 150, which is Exhibit 9?

The COURT. The answer, I assume is yes. Is that right?

The WITNESS. Yes.

Mr. FLYM. I call the jury's attention to what the letter says:

"Dear Sir:

I find myself to be conscientiously opposed to service in the armed forces. Would you please send me SSS Form No. 150 so that I might make my claim as a conscientious objector. Thank you for your cooperation."

Q In the interim between Mr. Sisson's reclassification to 1-A and the time that he requested a Form 150 to claim a conscientious objector deferment you received notification that he was employed with the Southern Courier in Alabama?

A We got a letter from the registrant.

[fol. 48] Q It was approximately December 28th, was it?

A We received the letter December 28th.

Q Do you have the sample form which you sent or the sample form which is an accurate copy of the form you sent the defendant, Exhibit 10?

A What form is that?

Q The 150.

A I don't have it here.

The COURT. The jury may have Exhibit 10.

Q This is an accurate copy of the form you sent him, is that correct?

A Yes.

Q "Instructions, Series Ib states, does it not, "I am, by reason of my religious training and belief conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in non-combatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and non-combatant training and service in the Armed Forces." Is that correct?

A Yes.

Q Series II, which concerns the bottom part of Page 1 and the upper half of Page 2, requests information about the application's religious training and beliefs; is that correct?

A Correct.

Q And there are seven numbered paragraphs requesting information with respect to the religious training and belief of the applicant, is that correct?

A That is correct.

Q Approximately, well, exactly two weeks after you mailed Form 150 you mailed an order to the defendant to report for induction, is that correct?

A That is correct.

Q What was the date that you included on the Form 150 by which time the defendant was required to submit his Form 150?

A What was the beginning of the question?

[fol. 50] The COURT. What was the date by which he was required to respond to Form 150 according to its own terms?

The WITNESS. He was supposed to return that within ten days after it was mailed to him.

Q That is within ten days, is that correct?

A Yes.

Q You mailed it on March 4th?

A Yes.

Q You mailed it to Mississippi, is that correct?

A Yes.

Q He was required to return it by March 14th; is that correct?

A That is correct.

Q What is the present claim of time within which an applicant for C.O. status must return the form?

Mr. SUCHECKI. Objection, your Honor.

The COURT. The objection is sustained. Irrelevant.

Mr. FLYM. May this be marked for identification?

The COURT. What is this?

Mr. FLYM. The minutes.

The COURT. They may, if agreed to. Are they being used in examining this witness?

Mr. FLYM. Yes, your Honor.

[fol. 51] The COURT. All right. Exhibit A for identification only.

[Minutes of Local Board Meeting, SSS Form 112, marked Defendant's Exhibit A for identification.]

Q Can you identify this document?

A Yes.

The COURT. I can't hear you.

A The minutes of the local board meeting of November 20, 1967.

Q What meeting was that insofar as the defendant is concerned?

A That is the meeting that he was reclassified 1-A.

Q Do you have the minutes of the meeting at which the defendant was ordered to report for induction?

A The minutes? No.

Q Are there such minutes in existence?

The COURT. I beg your pardon? I can't hear you. Are there such minutes in existence?

The WITNESS. Not at our office, no.

Q I'm sorry?

A No.

Q Not at your office. Are there minutes of that meeting in existence in any office?

A I wouldn't know.

[fol. 52] Q These minutes reported the action of—

The COURT. I want the record to be clear. By "these minutes" you mean Exhibit A for identification?

Mr. FLYM. Exhibit A for identification, your Honor.

Q These minutes reflect the actions taken, the classifications considered and acted upon by your local board on November 20, 1967, is that correct?

A That is correct.

Mr. SUCHECKI. No objection.

The COURT. Admitted as Exhibit A. I would like to see them, too. You may proceed.

Mr. FLYM. I need them.

The COURT. You want them. All right. Go ahead.

Q It appears on the first page of Exhibit A that the meeting lasted from 7:30 to 10:30, is that correct?

A That is correct.

Q And there are ten pages setting out the names of the registrants whose classifications were considered at that meeting, is that correct?

A There are eleven.

Q I see. How many names appear on each page, do you know?

A Twenty-four.

Q And they are all filled except for the last page on [fol. 53] which are set forth the names of fourteen individual, is that correct?

A That is correct.

Q So that in all 264 classifications were reviewed at that meeting, is that correct?

A Yes.

Q Including the defendant's, is that correct?

A That is correct.



Q These are the only minutes which exist with respect to that meeting, is that correct?

A That is correct.

Q That is, there is no record of discussions involving the classification of the defendant or of the registrants who are listed on that Exhibit A, is that correct?

A That is correct.

Q How frequently does Local Board 114 meet?

A At least once a month.

Q At least once a month. Do you have a record of when it met in February of 1968?

A Not with me here. At the office.

Q Do you have a record of when it met in March of 1968?

A At the office.

Q You don't remember when?

A Not exactly.

[fol. 54] Q But the board met prior to the mailing of the order to report for induction, which was sent to the defendant, is that correct?

A Prior to? I don't know what the dates were.

The COURT. Well, the Order of Induction, about which the question asked, is March 18, 1968, is that correct?

Mr. FLYM. Yes.

The COURT. The question addressed to you is do you know whether the board met before that order was issued? Obviously you know it met before the order was issued, but did it meet before the order was issued and considered the order? Is that what the question means?

Mr. FLYM. Yes, your Honor. Thank you.

A I don't remember the date they met.

The COURT. Do you understand that you are being asked as to whether you know whether the board considered whether to issue the order?

The WITNESS. To issue the order? Well, I received the order—

The COURT. No. Do you know whether the board considered whether to issue the order, which is Exhibit 11? Do you know whether the board considered whether

[fol. 55] to issue that Induction Order?

The WITNESS. No, I don't.

Q Can you tell me whether you at any time mailed any information to the defendant other than the information to which you have already testified?

Mr. SUCHECKI. Objection, your Honor. Would you limit that, please?

The COURT. Yes. I think that is a fair objection.

Mr. FLYM. Yes.

The COURT. Is there something else you want to ask on cross-examination?

Mr. FLYM. Only one question, your Honor. I am looking for, I believe it is Exhibit 2.

The COURT. Classification Questionnaire, is that what you want?

Mr. FLYM. Yes, your Honor.

Q Referring to Exhibit 2, are you responsible for making the entries which appear on the last page thereof?

A Some of them, yes.

Q Who else would make the entries thereon?

A Local board members.

Q Did you make the entries which appear in writing on the right-hand side of the page?

[fol. 56] A No, I didn't.

Q Do you know who did?

A The board members.

Q Insofar as you know, this is an accurate record of actions taken by the local board, is that correct?

A That is correct.

Mr. FLYM. No further questions.

The COURT. Is there any redirect examination?

Mr. SUCHECKI. No, sir.

The COURT. The Court will take a ten minutes' recess.

[Recess.]

The COURT. Your next witness, Mr. Suchecki.

Mr. SUCHECKI. Lt. Godin.

## ALFRED M. GODIN, Sworn

*Direct Examination*

Q [By Mr. Suchecki] Would you please state your full name, your rank and your occupation?

A Alfred M. Godin, First Lieutenant, United States Marine Corps.

The COURT. Please spell your last name.

The WITNESS. G-o-d-i-n, sir.

Q What is your assignment, sir?

[fol. 57] A I am Processing Officer at the Armed Forces Examining and Entrance Station, Boston.

Q How long have you been so assigned?

A Eighteen months.

Q Were you assigned to that position on or about April 17, 1968?

A Yes, I was.

Q Specifically what were your duties on that day?

A I took part in the induction processing as well as the enlisting phases.

The COURT. You were asked what your duties were.

The WITNESS. Sir, the Induction Officer.

Q Did you, sir, participate in the induction process that day to step forward?

A Yes, sir. I conducted the induction ceremony in the ceremonial room.

Q Calling your attention to registrant John Heffron Sisson, Jr., do you see him in this courtroom, sir?

A Yes, sir, I do.

Q Did you see him on that particular morning, sir?

A Yes, sir, I did.

Q Would you please tell us what happened and what you said to him and what he said to you?

A Sir, he took part in the induction ceremony, which [fol. 58] in essence follows these steps: he is informed that he is about to be inducted into the armed forces of the United States, that when his name and Service are called he will take the step forward. A roll call was conducted and he refused to take the step forward. After he refused to take the step forward he was advised of

the consequences, the fact that he was in violation of the Selective Service Act of 1967, and again offered a second time around to make sure he did not change his mind about refusing induction, I went through the prescribed procedure again and once more he did refuse induction.

Q Then what did you do, sir?

A At that time I took him into my office and, as policy prescribes, he was asked to make a statement to the effect that he did refuse induction, but he cared not to make any statement whatsoever.

Q Then what did you do, sir?

A Then he was sent home.

Mr. SUCHECKI. You may inquire.

### *Cross-Examination*

Q [by Mr. FLYM] Lieutenant, can you, insofar as you can recall it, say exactly what you said to the defendant at the time that you advised him of the consequences of his act?

A Do you mean after he refused the first step?

Q What did you say with respect to the first refusal?

The COURT. I think the question just put by the witness seems to be proper because on the direct testimony he indicated that it was after the defendant did not take the step forward on the first occasion that he, the witness, advised the defendant of the consequences.

You want to know exactly what those words were so far as the witness recalls them?

Mr. FLYM. Yes, your Honor.

The COURT. Then please tell us, so far as you can recall.

The WITNESS. All right, sir. In essence I advised him that it was in fact a serious offense to refuse induction, that anyone refusing induction would have to suffer the consequences, and we would be required to make a written report to the United States Attorney, and also the fact that he probably would be indicted and convicted in a court for this offense.

Q This is all you said to him?

A Yes, sir, as far as I can recollect. Of course, I also go through this with every individual that probably

will refuse induction. I try to get across to these people: [fol. 60] do they know what the consequences are? Do they know what refusing induction is, and so forth?

Q In apprising him of the consequences you said what you just testified to and nothing else, is that correct?

A Yes, sir. That is as much as I can recollect.

Q So far as you can recall it, what was the exact language you used when ordering everyone to step forward the first time?

A "You are about to be inducted in the armed forces of the United States," specifically into the United States Army. "When your name is called, you will take one step forward and such step will constitute your induction into the armed forces." Then we proceed to the roll call, and that is the time he refused to step forward.

Q After he refused the second time, you testified you invited him into your office, is that correct?

A Yes, sir.

Q Then you spoke to him, right?

A I simply asked him if he wished to make a statement. My regulations tell me that I give a man two occasions by which to accept induction under normal procedures. If he refuses the second time around we are to ask him if he desires to make a written statement to the effect that he did refuse induction in order to give [fol. 61] him ample time to explain why, and so forth, but in his case he did not want to make a statement.

Q Can you recall—I have asked you this before and if you have answered it, so be it, but if you can, could you try to quote yourself when you asked the defendant to make a statement about his refusal to submit to induction?

A I told him the exact words prescribed in the book.

Q What are the exact words?

A "I would like you—I am requesting, I am asking you to make a statement to the effect that you did refuse induction. However, I also want you to be aware of the fact that you do not have to make a statement."

Q That statement is the statement prescribed by your regulations, is that correct?



A Yes, sir. This is the regulation that prescribes that the Induction Officer ask the man to make a statement in the event he refuses the second time around.

Q And the statement that the man is to make is a statement that he refused induction?

A Yes, sir.

Q It does not in terms ask him to explain why he refused induction, does it?

A Right, sir.

Q That is, that is correct, it does not?

[fol. 62] A This is strictly a statement to the effect that he refused induction. This is all we ask him.

Q You don't inquire into the reasons why he is refusing induction?

A Mr. Sisson had initially along the way, prior to getting down to the induction room—

The COURT. I think you better answer the question. As a matter of practice, and in this case, do you and did you ask anything about the reason why the defendant refused induction?

The WITNESS. Yes, sir, I do. This is in the interim between the first and second refusal while I am in the oath room with the man.

Q What did you ask him?

A Pardon?

Q What did you ask him in the interim?

A I asked him basically what was the reason he was refusing. Was it religious belief? This is what he indicated to me.

Q He indicated to you that the reason he was refusing induction was because of his religious belief?

A Yes, sir, conscientious objector status.

Q That is what he said to you?

A That is right.

[fol. 63] Q When did he say that?

A Right after the first refusal.

Q After the first refusal. Now at the time of the first refusal there were approximately how many men in the room?

A I don't recollect the number. I believe there were nine inductees on that day.

Q The other eight inductees stepped forward, is that correct?

A Yes, sir. He was the only refusal on the 17th of April.

Q Approximately how much time elapsed after he refused to step forward and they had stepped forward before the conversation to which you just testified occurred?

A Approximately three to five minutes.

Q Were the other eight people in the room at that time?

A No, sir. He was counseled alone.

Q He was alone at the time?

A Yes, sir.

Q What did you ask him?

A Well, first, before I asked him anything, I advised him again of the consequences of refusing induction and advised him of the fact it was a felony, and I told him of the consequences, and I asked him if he was sure he knew what he was doing. And again we go right back to [fol. 64] the first induction ceremony—the second induction ceremony.

Q What you just testified to does not include any conversation that you may have had with the defendant. Did you have such a conversation?

A No, I did not have any conversation, what you might call a conversation. I am strictly there to try and establish the fact why this man is refusing induction so that in the event the United States Attorney needs any other information other than the fact he refused it is available.

Q Is there any regulation which requires you to inquire about the reasons for the refusal to submit to induction by anyone?

A No, sir.

Mr. SUCHECKI. Your Honor, that has been answered.

The COURT. That is a question which you, I think, ought not to put to him, but since the answer was No, I am sure you are all agreed that that is the correct answer.

Q You decided on your own to inquire as to why this defendant refused induction, is that correct?

Mr. SUCHECKI. Objection.

The COURT. Well, he may answer that. You did this on your own?

[fol. 65] The WITNESS. Yes, sir.

Q What did you ask him?

A What his reasons for refusing induction were.

Q In those words, you said, "What are your reasons for refusing induction?"

A Yes, sir. Actually refusal is in the same category—

Q Do you ask everyone who refuses the same question?

A Yes, sir. Like I said, after this man refuses induction, as far as I am concerned, this is an informal type thing between the man and myself because, again repeating what I said initially, I am there to inform the man, making sure these people are not just doing this and maybe not knowing what is behind the seriousness of this offense.

Q After he refused induction who did you notify about the refusal?

A We notified the United States Attorney by letter, a copy to the Selective Service Headquarters, as well as his local board, and his records are returned to the local board indicating the fact that he did refuse.

Q And the notice that he refused is in fact submitted on a form for that purpose, is it not?

A The form where his records are delivered to the AP's are returned with a mark, with a notation "Re-[fol. 66] fused" but this is not notice of refusal.

Q You yourself wrote something on this form to the effect that Mr. Sisson had refused to submit to induction, is that correct?

A I did not write the word "Refused" itself but I signed an authenticated form to verify the entry.

Q In any event, you were responsible for notifying the authorities, the United States Attorney's office, about Mr. Sisson's refusal to submit?

A Yes, sir.

Q Did you anywhere at any time communicate your conversation with the defendant wherein he supposedly said that he refused because he was a religious conscientious objector?

A I did not. My official notification letter stated that the man was offered the opportunity to execute a statement but he refused to make a statement.

Q That in fact is the standard way in which to notify the United States Attorney's office about anyone who refuses induction, is it not?

A Yes, sir, by official letter.

Q Indeed you never notified the United States Attorney's office about the reasons why a man refuses induction, do you?

[fol. 67] A Again back to this fact that we ask the man to make a statement. A lot of times a man may come in and want to refuse. What basis is there for refusing? He has a statement or he brings in a letter or he desires to sit down and write a statement himself which has to accompany the letter to the United States Attorney.

Q You yourself did not undertake to write a description of the informal conversation you indicated you conducted?

A No, sir.

Q You have never done this?

A No, sir, I never have.

Mr. FLYM. No further questions.

The COURT. Is there any redirect examination?

Mr. SUCHECKI. No, sir.

The COURT. You are excused.

Mr. SUCHECKI. The Government rests, if your Honor please.

Mr. FLYM. Mr. Sisson.

JOHN HEFFRON SISSON, JR., Sworn

*Direct Examination*

Q [By Mr. Flym] Would you state your name and address?

A John Heffron Sisson, Jr., Trapelo Road, Lincoln, Massachusetts.

[fol. 68] Q You are the John Heffron Sisson, Jr. who is charged with refusing to submit to induction in this case?

A Yes, I am.

Q There was testimony in court this morning and you heard that testimony, is that correct?

A I did.

Q There was testimony that you attended Harvard College. Did you?

A Yes.

Q Did you graduate from Harvard College?

A Yes, I did.

Q When did you graduate?

A June, 1967.

Q Prior thereto what school did you attend?

A Phillips Exeter Academy in Exeter, New Hampshire.

Q Would you keep your voice up?

A Yes.

Q Where were you born?

A Boston, Massachusetts.

Q Have you ever resided anywhere outside Massachusetts?

A Yes, for a short length of time.

Q Your present address is in Lincoln, is that correct?

A Yes, sir.

Q How long have you lived there?

[fol. 69] A Since 1951.

Q Since 1951. Have you ever been charged or convicted of any offense except for minor traffic violations?

A No, I have not.

Q Lt. Godin testified to a conversation which occurred between your first and second refusals to step forward. Did you hear his testimony with respect to that?

A Yes, I did.

Q Did the conversation occur?

A Not to my knowledge and recollection.



Q Did you refuse because you were religiously opposed as a conscientious objector?

A No, I did not.

Q Do you consider yourself to be a conscientious objector on the basis of religious training and belief?

A No, I do not.

Q You requested a Form 150 from your local board by letter which was received by your local board on February 29, 1968. Perhaps it was dated February 25. You did request a Form 150, is that correct?

A Yes, I did.

Q You did not mail back the Form 150, is that correct?

A That is correct, I did not.

Q Why did you not return the Form 150?

[fol. 70] A Because I realized I could not make honestly a claim to conscientious objection to war in any form as it is put on the Form 150, and also because I knew that I could not accept or ask for any—

The COURT. I couldn't hear you. Also because you knew what?

The WITNESS. That I could not ask for or accept any exemption from the Selective Service System.

The COURT. Would you read back that answer?

[The answer is read.]

Q Why could you not accept a deferment or exemption from the Selective Service System?

A Because I believed and I still believe that the system of exemptions and deferments is unequal and discriminates against those who do not have education, for instance, or money, and since, therefore, the burden of service in the armed forces falls unequally and unjustly on the citizens of the United States, and the deferment system is part of this unequal and unjust treatment, I could not accept such deferment.

Q You graduated from Harvard College in June of 1966, is that correct?

A June of 1967.

Q June of 1967. What happened thereafter? What did you do?

[fol. 71] A I entered training for the Peace Corps in July.

Q Until when did your training for the Peace Corps continue?

A Until the end of September.

Q What happened then? Why did it terminate at that time?

A Because the Board of Selection that considers those people who are trained for the Peace Corps deselected me. That is their term.

Q I couldn't hear you. I don't think the jurors can hear you either. Will you speak up?

A Because the Board of Selection in charge of selecting those trainees who are going to serve overseas in the Peace Corps as volunteers deselected me, which means they selected me not to go.

Q Do you know the reason why you were deselected?

A I was told in a general way of the reasons but specifically No because I was not present at the meeting of the Board of Selection.

Q After that, according to the testimony, you went South, is that correct?

A Yes, after a couple of months.

Q And where did you take up employment?

A I was working as a reporter for the Southern Courier, which was based in Montgomery, Alabama. I was reporting from Mississippi, mainly Greenville.

[fol. 72] Q You continued as a reporter on the Southern Courier for how long?

A Until June, 1968.

Q After graduating from Harvard College did you at any time register for graduate school?

A I did register briefly at the Boston Architectural Center.

The COURT. I can hardly hear you. You registered briefly where?

The WITNESS. At the Boston Architectural Center in October, I believe.

Q Did you consider applying for 2-S deferment in connection with your graduate studies?

A I did.

Q What was your decision?

A That I could not ask for or accept the deferment, such a deferment.

Q What were your reasons at that time?

A Largely the same that I stated before, that I felt that I was as qualified as anyone who was having to serve in the armed forces to serve, and that I believed that such exemptions and deferments were not just and, therefore, could not accept.

The COURT. I would like to be a little clearer than [fol. 73] I am as to exactly what you testified to. If I understood you correctly, you said you registered at the Boston Architectural Center in October, 1968, is that correct, or October, 1967?

The WITNESS: October, 1967.

The COURT. And by "registered" do you also mean metriculated in the sense you became a member of the student body?

The WITNESS: Yes, very briefly.

The COURT. When did you cease to be a member?

The WITNESS. About two weeks after that, after I registered.

The COURT. Then, if I understood you correctly, from your own statement you were a student for only two weeks, so that the possibility of being a 2-S student or 2-S person under the draft act existed for only two weeks, is that right?

The WITNESS. That is true, but it existed on purpose for only two weeks. I left school because I knew I couldn't ask for the deferment. That had been my thinking when I applied to the school, that I would request a deferment.

The COURT. I am not cross-examining. I just wanted to find out what the fact was.

[fol. 74] Q Your reason for originally applying for graduate school was the thought that you might be deferred as 2-S?

A Largely, yes.

Q When you determined you could not conscientiously ask for a 2-S deferment you terminated your schooling, is that correct?

A Yes.

Q Why did you refuse to submit to induction?

A I refused induction because I believe the war in Vietnam, that is, the United States war making in Vietnam, to be wrong on every ground by which I could judge it, and to be immoral, and to be illegal and to be unjust and unjustifiable in any way, and because it went against my principles and my best sense of what was right. Therefore, I felt that by accepting induction that even though I might not be sent to Vietnam, I would be consenting to the Government's waging of war in Vietnam, and I believed it my duty not to consent with that action because I did not consent in my own mind.

Q What was the basis for the conclusion you just articulated which prompted you to refuse to submit?

A My continuing knowledge of the nature and the history of our involvement—the United States' involvement in Vietnam, and the conclusions that I and others [fol. 75] —that I either drew myself or that were drawn by others as to the specific question whether the war was legal, whether it was moral, whether it was justified, whether it was in our national interest.

The COURT. The last thing I am trying to do is lead you into any view. I merely want to be sure that I understand what your testimony means. You have used the word "immoral" twice, and you used the word "unjust" once and at an earlier stage in response to a question you stated that you could not claim conscientious objection on the ground of a religious objection or on the ground of religious training and belief.

Now all I want you to do is to explain as clearly as you can what you mean by immoral and unjust.

The WITNESS. Immoral means contrary to my moral values, my ethics.

The COURT. Your personal moral ethics?

The WITNESS. Those that I have myself. Those are the only ones that I have myself.

The COURT. You don't mean contrary to any creed or any formal set of values of a group or any pattern of any philosophical nature; you just mean that they are not in accordance with your personal moral views?

The WITNESS. They can also not be in accordance—  
[fol. 76] The COURT. Well, of course they can be lots of things. What I am asking you is what you mean by immoral.

The WITNESS. My moral values come from the same sources that you mentioned, religious writings, philosophical beliefs.

The COURT. I am not suggesting or trying to put words into your mouth. I am quite sure that because of your age and because of your training you are familiar with many doctrines in this area and that you are undoubtedly better informed than most defendants about problems raised in the Seeger and other cases, and I am not raising any new problems for you.

I am merely trying to have you state as precisely as you can, in the light of your superior education, the exact position you take.

The WITNESS. Where would you like me to begin?

The COURT. I would like you to state as exactly as you can what you mean by the use of immoral and what you mean by the use of unjust. Your counsel may explore it further, and so may the Government. I am merely telling you I would like to know what you mean.

The WITNESS. Specifically in relation to Vietnam I mean that one of the moral values I hold is respect for human life. The war in Vietnam, the United States' [fol. 77] participation in that war shows to me the opposite or the lack of that value on the part of the United States. That is one of the specific things of what I mean.

The COURT. I would like the record to show that I am not trying to stop you. You can go on as long as you like.

The WITNESS. Another moral value that I hold is the value of man's freedom, and it appears to me, and it appeared to me then, that the United States' participation or involvement in the war in Vietnam was not in the interest of freedom of either the Vietnamese or of ourselves. Therefore, I felt it to be immoral, our actions.

When I said unjust, I mean the destruction that comes from the United States' involvement in Vietnam, in the



war there, the scale of destruction and killing is not consonant with—it has no justification, it is not justified in terms of which the United States states its purpose. That is, even if you take the United States' explanation for our presence there, which includes something to the effect that we are defending the liberty of the people of South Vietnam, the amount of killing of the people of [fol. 78] South Vietnam, the amount of destruction of the country of South Vietnam seems to me to deny that supposed purpose, and it is unjust because it does not serve that purpose.

Q Have you completed your answer?

A Yes, I have.

Q Now, I believe that in addition to the adjectives which the Court pointed to, namely, immoral and unjust, that you used at least two other adjectives in your original answer. Would you describe the reason why you refused to be inducted, bearing in mind that you have already testified with respect to your belief that the war is immoral and unjust?

A Excuse me, I didn't—

Q Why else did you refuse to submit to induction?

A I stated that other reasons were that the war is illegal and, as I said, unjustified.

Q What do you mean by your statement that the war is illegal?

Mr. SUCHECKI. I object, your Honor.

The COURT. I will allow it but I am going to inform the jury that I will give them instructions with respect to this. He is not now being asked why the war is illegal; he is being asked why he believes the war is illegal.

A Because I have not seen any what appeared to me [fol. 79] to be legitimate, legal grounds for our being there, and I have seen and heard and know of information or knowledge that leads me to believe that we acted either outside of the law or broke the law or treaties to which we were a party in being in Vietnam.

The first and most basic is that the Government that we claim to be supporting is in fact illegal, and our efforts to create and then support that Government, starting in 1954, were contrary to international treaties,

namely, the Geneva Accords, which provided, among other things, that no outside powers would give military assistance—that no outside powers could give military assistance to either section of Vietnam.

The COURT. Is that the end of the examination?

Mr. FLYM. No.

The COURT. I wasn't quite sure. I saw you sit down.

Q Please continue.

A Other aspects of the illegality concern international commitments not to commit aggression, which the United States has violated in its bombing of North Vietnam and even in its presence in South Vietnam.

It seems to me that its presence there from the very beginning, which was 1954, the division of Vietnam into [fol. 80] two parts, the temporary division, has been illegal.

The United States aided a group in the South to not comply with the provisions of the Geneva Accords for an election to determine the Government of all of Vietnam. Those elections were never held. And then by furnishing military aid and arms and advisors to this illegally created government. Also the United States has not, I believe, although it is fighting a war, it has not entered into that conflict according to the laws of this land as set down in the Constitution.

It has largely been an action of the Executive Branch of the Government without the necessary participation of the Legislative Branch. Those are the main points or considerations or the facts that led me to believe the United States' involvement in Vietnam is illegal.

Q You just testified with respect to your point that the war in Vietnam somehow violates the domestic requirements of American law and Constitutional law. You said something about the Executive and the Legislative combining for action. What did you mean by that?

Mr. SUCHECKI. If your Honor please, if counsel wishes to testify—

The COURT. I said he could testify as to his belief [fol. 81] but I certainly will not allow him to testify with respect to the law with respect to this matter or to questions that lie outside the jurisdiction of this Court,

in accordance with an earlier Opinion of mine and familiar to you.

Mr. FLYM. May it please the Court, at no point in time has it been my intent to have the witness, or any other witness, testify about the legality of the war in Vietnam. The questions are solely addressed to the nature of his belief.

The COURT. He has already said he believes the war is illegal because it is not according to the laws of the land as set forth in the Constitution, and it was determined largely in an action or actions of the Executive Branch of the Government without the Legislative Branch.

Have I fairly summarized what you said?

The WITNESS. Yes, sir.

Mr. FLYM. My purpose, your Honor, is simply to inquire into the more particular details of it.

The COURT. You may have more particular details. The question is what is his belief and not what your knowledge is.

Mr. FLYM. Yes, your Honor.

[fol. 82] The COURT. If he has some belief he has not stated, he may tell it.

Is there anything you haven't said that you want to say?

The WITNESS. I have stated my beliefs in general terms. I could enter into more specifics.

The COURT. All right.

Q Well, please do enter into the specifics.

A In connection with what I said last, my understanding of the powers of the United States to make war is that Congress is empowered to declare war. It is also the power of Congress to make appropriations for the military, and my understanding from history, the writing of the Constitution, is that the purpose of empowering or giving Congress those powers and not lodging them in the office of the President, or other Executive Branch, is to make it difficult for the decision to go to war to be made without the most careful considerations, and I believe that in this case, with Congress being left entirely out of the decision making, the decision on which the United States' involvement in Vietnam is based, that

therefore that decision was not made with the greatest consideration, the consideration that it must have, and the framers of the Constitution realized must be taken [fol. 83] when a nation decides to go to war.

I believe it is even more important now than at the time the Constitution was written because the power of the United States to do harm, not only to the country but to the whole world, is that much greater, much greater, and that it cannot be allowed to enter into wars without full consideration and deliberation and the consent of the Congress and the people, which the Congress is supposed to represent.

Q Would you give similar specifics with respect to the other elements to which you have already testified, something about illegality?

A My main knowledge of the illegality of our participation in the war with regard to international law is based on what I understand to be based on the Geneva Accords and the provisions to which we did not sign but which we agreed to which determined the end of the French Indo-China War and the plan for the future political resolution of the problems of Vietnam.

My understanding is that Vietnam was to be divided at the 17th Parallel temporarily in 1954, that elections were to be held within the next two years to elect a government for all of Vietnam, North and South, that in the intervening time no foreign powers were to give [fol. 84] any military aid or build any military bases in either section of Vietnam, and that the neutrality of this area was to be upheld by an international control commission.

I understand to the best of my knowledge that the United States violated—although it agreed to the principles of the Geneva Accords, it violated those principles and specifics by giving military assistance to the government of Diem in the form of advisors and material, and gave Diem also economic assistance to establish a government, a permanent government in South Vietnam that was not according to the Geneva Accords supposed to be established, and that they aided him in his refusal to

allow elections to be held in that part of the country to elect a government for all of Vietnam freely.

Therefore, the United States aided in an illegal way the establishment of an illegal government in South Vietnam and continue to in violation of the Geneva Accords.

Q Have you completed your answer?

A Yes.

Q You earlier referred in your testimony to an international commitment not to commit aggression. Would you give specifics with regard to that part of your testimony?

The COURT. I think you have been adequately in- [fol. 85] dulged. Mr. Suchecki is objecting here because all that could possibly be relevant, as I said before, in a prosecution for willfully refusing to obey an induction order is evidence with respect to belief to the extent it bears upon the issue of intent. Belief is not admissible in order to show motive or good faith, and least of all is it admissible in order to show what the law, national or international, is. I now think Mr. Suchecki's point really deserves to be sustained.

He is now discussing political motive, good faith and other issues, which are not open in a criminal prosecution under this statute, as I ruled in advance.

Mr. FLYM. May it please the Court, we are not offering this testimony with respect to the question of good faith or with respect to the question of motive. We are offering it expressly with respect to the issue in this case of the defendant's intent.

The COURT. Whether he intentionally violated the order?

Mr. FLYM. Yes, your Honor.

The COURT. All right. If you can show anything that relates to that which persuades the jury, that of course is a different question.

Mr. FLYM. That is my sole purpose, your Honor. [fol. 86] None of the testimony which I will request of Mr. Sisson has anything to do with any issue whatsoever except the question of his intent.

The COURT. Don't misuse the word intent. It is intentionally.



Mr. FLYM. Willfully, your Honor.

The COURT. Willfully.

Mr. FLYM. It is with respect to the use of that word that I offer the testimony.

The COURT. It is not specific intent as your request seems to suggest.

Mr. FLYM. Your Honor, may I be heard on the question, perhaps outside the hearing of the jury?

The COURT. Yes, at a later time, surely, unless you want it now.

Q Would you state the sources of the information on which you base your belief, as you have described it.

A They were sources, mainly newspapers, the television, the news on television, magazine articles, some books, sources that anybody could avail himself of. Specifically, I mainly read the *New York Times* and the Boston newspapers, the *Christian Science Monitor*, magazines such as the *New Republic*, *Ramparts*, the *Nation*, and various less formal literature, leaflets, and most importantly dis-[fol. 87] cussions with friends through whom I came in contact with a good deal more than just what I have read. I came in contact with books that I had not read myself but through discussions with friends I learned of their content, such books as Bernard Fall's books, *The Vietnam Reader*, *Vietnam: The Logic of Withdrawal*, by Howard Zinn. The positions of the Committee of Lawyers on Vietnam, and those expressed in Richard Falk's book. I can't recall the specifics.

Q I believe you said that you felt some of your sources were from newspapers?

A Yes.

Q Did you read any one newspaper regularly?

A Yes. I read the *New York Times* daily for a number of years.

Q Approximately what period of time?

A From the time I was in college, 1962 to 1967, and beyond 1967.

Mr. FLYM. Your Honor, if I may be permitted, with due respect for your Honor's earlier ruling on the question I asked the witness, I would like to ask him a similar question but asking for a name. He referred to

international commitments. I would like him to identify what he is referring to.

[fol. 88] The COURT. That much you may have. What commitments did you refer to as the grounds for your belief?

The WITNESS. Commitments to the United Nations about war, commitments that we had under the South-east Asia Treaty Organization, commitments that we had with the Nuremberg Trial and various Geneva Agreements about the rules of war.

The COURT. Don't you think I have now allowed you all the scope you expected plus some?

Mr. FLYM. Certainly not the scope I hoped for, your Honor. If I may be permitted, your Honor, I would request a hearing on the question.

The COURT. The jury is excused until 2:15. Please. This is a courtroom. The argument you want to make you had better make at the bench because it must not reach the jury directly or indirectly.

I am not trying to evacuate the courtroom but you are not going to hear anything, ladies and gentlemen.

[Conference at the bench between Court and counsel as follows:

The COURT. What is it you want to say?

Mr. FLYM. May it please the Court, I had considered this question—

The COURT. There is to be no conversation in this [fol. 89] courtroom under any circumstances, ladies and gentlemen. If I find it necessary to administer the order by authority vested in me I shall.

Mr. FLYM. May it please the Court, what I have to say is based substantially on conversations with Profs. Sacks, Dershowitz, Freund, and Prof. Mansfield will be here at two this afternoon to join in the defendant's case. I indicate this only because the particular issue is so critical. It is the defendant's defense in reality, and I will do my best to present the position. I beg your Honor's indulgence with respect to the argument.

The COURT. If you want Mr. Mansfield to make the argument I will wait until then. If you want to make

it yourself, you may make it yourself, but you cannot under the patronage of people not here either in their person or in their writings very well say what they would have said.

Mr. FLYM. That is correct, your Honor. What I would request is permission to make the argument and supplement it ever so briefly with any suggestion which Prof. Mansfield might make.

The COURT. Don't you want him to hear what you say?

Mr. FLYM. I would prefer that, your Honor.  
[fol. 90] The COURT. All right. I will hear you at two o'clock, or shortly thereafter.

[Recess.]

[fol. 91] AFTERNOON SESSION

2:00 p.m.

[Conference at the bench between Court and counsel as follows:

The COURT. Mr. Mansfield is allowed to participate. I don't know whether he is a member of the bar of this Court.

Mr. FLYM. He is not.

The COURT. Who wishes to speak first?

Mr. FLYM. I will, your Honor. It appears to be clear that if Congress had in fact written a statute which included as a defense to be raised by someone charged with refusal to step forward, if he reasonably believed the war to be illegal that would be a defense, and this Court would have jurisdiction and would have the duty to apply that defense. It is not a question of jurisdiction or power.

The question, at least at the threshold, is whether Congress in fact did this when it employed the word willfully in connection with this statute. The word willfully has been used and interpreted by the Supreme Court in four, possibly five cases spanning roughly 80 years, beginning with the Felton case, which I believe was decided in 1874

[fol. 92] or thereabouts. There were subsequent cases in the 1890's.

There was the Spruce case and the Murdock case. The word willfully as interpreted by the court has been held to mean a specific intent, bad purpose, evil intent. Intent to do wrong is implicit in the statute through the use of that word. In the Murdock case the question was one of reasonable belief whether the defendant was required to answer certain questions. The logical parallel in this case would be a question of the reasonable belief of this defendant about submitting to induction. We would offer evidence that his belief is a belief which would be held by reasonable men that the war is illegal on a variety of grounds.

The question of intent, of course, is a highly complex one, including many components. Certainly, on the basis of the defendant's testimony, one component includes his belief that the Nuremberg principles are applicable to his situation, to his order to report for induction.

The question, insofar as his defense is concerned, is whether he was reasonable in believing that the Nuremberg principles applied to him and required that he refuse to submit to induction. I think this is one branch with respect to the difference between the Murdock case [fol. 93] and this case.

Mr. MANSFIELD. It might be helpful to remind the Court that in the Screws case willfully was interpreted to require this specific intent directed to the question of the wrongfulness or unlawfulness of the conduct to avoid what the court considered difficult problems of vagueness and also the background problems of Federalists. It might be thought that this case offers something of a parallel, that whereas other things being equal one might not construe willfulness as suggested by the defendant, in this case were Constitutional difficulties in the background relating to the question of selective conscientious objectors, it might be permissible to interpret willfulness in a way suggested in the Screws case and Murdock case. I would like to emphasize to the Court the slight difference between this case and the Murdock case. In the Murdock case the defendant had failed to disclose cer-

tain information relating to his Internal Revenue situation. The court concluded that his refusal was a reasonable refusal. Notwithstanding the court's subsequent ruling, the privilege did not apply in that case.

In this case it is a little more complicated because the [fol. 94] question of the reasonableness of the defendant's refusal to be inducted or to submit to induction is tied into the question of his belief about the illegality of the war.

Nevertheless, it seems that looking at the question of his reasonable belief as a unified question, there is a close relationship between his belief and the illegality of the war and his belief that he was entitled to or under a duty not to submit to induction.

I should like to make one final point. If evidence is offered on the question of opinions as to the legality of the war one might well ask, "What is the relevance of this evidence to the precise question of the belief or the reasonable belief of the defendant that he was under a duty or had a right not to submit to induction?"

It is relevant, I submit, because the question is not merely the internal workings of the defendant's mind, whether they comport with some notion of rationality, but whether or not by some objective standard a reasonable position on the question of the war would be that it was illegal.

In other words, the defendant is entitled, as he would be in any negligence case, to the benefit of that standard without necessarily an inquiry into the actual substantive [fol. 95] workings of his mind.

The COURT. Would you tell me for what purpose I am treated to this colloquy?

Mr. FLYM. Yes, your Honor. The questions I would request leave to ask of the defendant would bring out the nature of the facts which underlie his belief. We would subsequently offer evidence which would place them in context for the jury so the jury would have a basis for making an intelligent determination as to the nature of that belief.



The COURT. I have given you the opportunity to make the statement. When I am required to make a ruling I will.

Bring the jury down.

[End of conference at the bench.]

[The jury enters the courtroom at 2:25 p.m.]

JOHN HEFFRON SISSON, JR., Resumed

*Direct Examination*

Q [By Mr. Flym] Mr. Sisson, in your testimony this morning you referred to a variety of international agreements, including the so-called Nuremberg Charter. Would you describe or tell the Court and jury what part your belief with respect to the Nuremberg principles had in [fol. 96] your decision to refuse to submit to induction?

Mr. SUCHECKI. Objection, your Honor.

The COURT. Overruled.

A The Nuremberg principles influenced me in my decision in two areas. First, they specifically charged men with the duty to act out of their own conscience, not only in relation to what they were ordered by authorities or authorities through the law to do; it specifically came out of World War II, part of the tribunal that was punishing war criminals, mainly German war criminals, and in response to the defense by various members of the German Army and the Gestapo and other parts of the German Armed Forces, which were responsible for what were believed to be war crimes, such as the extermination of the Jews, the attempted extermination of the Jews, the court or the tribunal said that the defense that one was ordered to commit a crime by his superior officer or superior authorities was not a defense, a legitimate defense, because one has the duty to act out of conscience as well as out of obedience to the law.

Specifically with regard to myself, I saw a very clear parallel; although I was ordered by my Government, the Selective Service Branch, which is part of the Govern-

[fol. 97] ment, to be inducted into the armed forces I had to consider for what purpose I was being inducted and what ends my induction were serving.

Those ends and those purposes were largely the continued waging of the war in Vietnam, which I considered to be a crime, and also which I considered to be against my best principles, namely, that I would not go to a country such as Vietnam or anywhere to kill or to contribute to the killing of people for no reason that was just to myself just because some higher authority told me that these people must be killed.

I felt that if in my conscience I could not kill or contribute to the killing of these people that I must refrain from doing so even if it meant violating the law on order from my Government or superior authorities in the Government.

There was another part of the Nuremberg principles which influenced me, which speak of war crimes and crimes against humanity, and specifically list certain acts of war which are held by the tribunal to be crimes.

These include massive bombing of civilian populations, the use of gas and chemical warfare. There are principles as to how war is to be conducted and also how a war is to be legitimately entered into. The purpose [fol. 98] of these principles is to avoid or to make unlawful actions of countries at war which are regarded to be evil and to, therefore, protect us all from perpetrating evils and crimes on our fellow man.

I believe that the United States has violated some of the principles of the Nuremberg Tribunal through its conduct of the war in Vietnam. The most obvious is the destruction of the civilian population, but there were others, such as the use of certain weapons and forms of warfare. These are the other parts of the Nuremberg principles that influenced me in my decision to refuse induction.

Mr. FLYM. Your witness.

The COURT. Is there any cross-examination?

Mr. SUCHECKI. Yes, sir.

*Cross-Examination*

Q [By Mr. Suchecki] Mr. Sisson, do you remember getting the order to go to the induction center?

A Yes, I do.

Q Did you refuse to comply with that order?

A No, I did not. That is, I did report to the induction center.

Q Once you got to the induction center did you submit [fol. 99] to induction?

A No, I did not.

Q Did you do this inadvertently?

A No, I did not.

Q Did you do this freely? Was it your own free will to do this?

A Insofar as one has free will, yes.

Q Something of your own free choice?

A It was my own choice.

Q You did it deliberately? You deliberated your decision?

A Yes, I did.

Q You knew the penalties for non-compliance?

A Yes, I did.

Q Did you apply for any appeal from any of your classifications by the local board?

A No, I did not.

Q Now you were classified on October 6 of 1964 as 2-S, is that correct?

A Yes.

Q Did you accept that classification?

A I did.

Q You were classified 2-S on October 11, 1965, is that correct?

A Yes.

[fol. 100] Q Did you accept that classification?

A Yes, I did.

Q Again on November 7, 1966 you were also classified 2-S, is that correct?

A Yes.

Q Did you accept that classification?

A I did.

Q On June 19, 1967 you were classified 2-A; is that correct?

A Yes, it is.

Q Did you appeal that classification?

A Did I appeal or did I accept it?

Q Did you do anything at all in response to it? You accepted it, did you?

A Yes, I did.

Q On November 20, 1967 you were classified 1-A?

A Yes, sir.

Q Did you appeal that classification, sir?

A No, I did not.

Mr. SUCHECKI. No further questions.

Mr. FLYM. No further questions.

The COURT. You are to return to your seat. Next witness.

[fol. 101]

RICHARD FALK, Sworn

*Direct Examination by Mr. Flym*

Q Will you please state your name and address?

A Richard Falk, 401 Marlowe St., Palo Alto, California.

That is a temporary address. My permanent address is 35 Clover Lane, Princeton, New Jersey.

Q What is your occupation?

A I am a Professor of International Law at Princeton, University.

Q What is your training in law?

A I attended Yale Law School and completed my LL.B. in 1955 and then was admitted to the bar in the City of New York shortly thereafter. I taught at Ohio State Law School for a period of years and then I returned to become a student at Harvard Law School and received a J.S.D. degree in 1961, I believe.

Q After 1961 what was your occupation?

A I have been a Professor at Princeton since that time.

Q What department at Princeton?

A In the Woodrow Wilson School of Public and International Affairs and in the Department of Politics. I

have also been affiliated with the Center of International Studies at Princeton.

Q Do you have the title of Professor of International [fol. 102] Law at Princeton?

A Yes. There is an endowed Chair, the Albert G. Milbank Chair of International Law and Practice that I hold.

Q Will you please tell the Court and Jury your professional affiliations and activities?

A Well, the main professional affiliations that are important, I suppose, are that I have served on the International Law Committee of the City Bar Association of New York and I have been Chairman of the Vietnam Subcommittee of that Committee. I have been an active member of the the American Society of International Law, which is the basic professional association, and in that role have served on the executive council of the society, and have also been acting as the Chairman of the Civil War Panel, which has engaged in a series of studies of the relevance of international law to civil war problems and has been concerned with the problems of Vietnam.

On that panel are the leading international lawyers in the United States who are concerned with the Vietnam war and who represent the major positions that have been taken in relation to the war by international lawyers. I have also acted as an editor of the American Journal of International Law and served as co-editor of [fol. 103] World Politics, which is a quarterly international journal.

In addition, I have acted as Chairman of the Consultative Council of the American Lawyers Committee on Policy Towards Vietnam, and in my role as Chairman have constituted a council that includes a series of international lawyers who teach at the leading universities in the United States.

Would you like me to name the membership of the Consultative Council?

Q Yes.

A Hans Morgenthau of the University of Chicago; Stanley Hoffman, Harvard University; Quincy Wright,



University of Chicago and later University of Virginia; John Herz, City University of New York; Wolfgang Friedmann, Columbia Law School; Burns Weston, Iowa Law School; Lawrence Velve, Kansas Law School; Saul Mendlovitz, Rutgers Law School; Richard Barnet, the co-director of the Institute for Policy Studies in Washington. I think that is the membership of the Consultative Council. Also John Fried of the City University of New York. The work of this Consultative Council consisted principally in preparing an extended legal analysis of the main problems of international law presented by the [fol. 104] American involvement in Vietnam, and it was intended in part to enlighten the public and community-at-large as to the legal dimensions of the American involvement in Vietnam and to that end sought to distribute the conclusions of its analysis partly through the publication of a book that has been distributed in the United States and has been translated into foreign languages and partly through shorter summaries of its argument being presented to the public in the form of long paid newspaper advertisements. Press conferences have been held at various times; also meetings between the head of the Lawyers Committee and officials of the United States government have been held at different times in an effort to communicate the conclusions of the Consultative Council to the United States government.

Let me just add one thing to the work of the Civil War Panel. It published through Princeton University Press a volume entitled *The Vietnam War and International Law* which contains most of the writing that has been done in law journals and professional journals on both sides of the legal question, and I served as editor of that in part as a consequence of my being Chairman [fol. 105] of the Civil War Panel of the American Society of International Law.

Q Have you had any consulting relationships?

A I have in the past had some consulting relationships, yes.

Q Have you had a consulting relationship from 1962 to roughly the present?

A I suppose you are referring to the World Law Fund?

Q That is my question yes.

A Yes. I have acted in that relationship. That is a small foundation that is concerned with general problems of world order and the relevance of law to international society.

Q. Would you name the books which you have authored or co-authored?

A I will try. *The Role of Domestic Court in the International Legal Order*, *Law, War and Morality in the Contemporary World*, *Legal Order in a Violent World*. I co-edited a 4-volume series entitled *The Strategy of World Order*, and I co-edited a book called *Security Through Disarmament*.

In addition to the books I have mentioned previously, the two books on Vietnam, *Vietnam and International Law* and *The Vietnam War and International Law*—I [fol. 106] think those are the principal books that I have been concerned with—I also wrote two articles in the Yale Law Journal concerning the legal aspects of the American involvement in Vietnam. The Yale Law Journal published the State Department Memorandum in defense of the United State's involvement in Vietnam; and the editors of the Yale Law Journal invited me and two other people to comment on that Memorandum, and that led to a series of articles which then elicited some responses, and I again responded to the responses and that consisted of the second article.

Q Have you written chapters which were published in books with respect to international law?

A Yes, quite a number.

Q Without naming them could you estimate the approximate number?

A About 10.

Q Again can you estimate the approximate number of articles you have written about international law?

A 25 or so.

Q How many of those 25 were specifically directed at the Vietnam conflict?

A 5 or 6.

Q You referred to a Consultative Council of which [fol. 107] you are a member. Does that Consultative Council include so-called experts with respect to the war in Vietnam, representing both points of view, that is the point of view that the war is legal as well as the point of view that the war is not legal?

A The Consultative Council includes only people who regard the American involvement in Vietnam as illegal. The Civil War Panel to which I referred earlier includes people who take both positions.

Q Is the Consultative Council the same body as the Lawyers Committee to which you referred?

A No. The Consultative Council is a group of academic experts on the legal problems posed by the Vietnam war. The Lawyers Committee as a whole is a citizens group constituted by lawyers concerned about the American involvement in Vietnam. The Consultative Council has worked fairly closely with the Lawyers Committee but it has really retained independence in terms of the work it has done, such as the preparation of this book that I have referred to.

Q Is the Consultative Council a consultative council of the Lawyers Committee or are they independent?

A They are independent in the sense that we have operated on the basis of our own sense of what would [fol. 108] contribute to a clarification of the legal issues. We never defined formally the relationship between the Consultative Council and the over-all Lawyers Committee.

Q Did you indicate or did you testify that the purpose of the Lawyers Committee as well as of the Consultative Council was to inform public opinion with respect to Vietnam and the legality of the Vietnam war?

A Yes, the legal implications of American policy in Vietnam.

Q That was the purpose of both the Lawyers Committee and the Consultative Council?

A Yes.

Q You have referred to a book by the name of *Vietnam and International Law*. Is this the book (indicating)?

A It is.

Mr. FLYM. May this be marked for identification?

The COURT. It may be marked for identification.  
Exhibit B for Identification.

[Book entitled Vietnam and International Law  
marked Defendant's Exhibit B for Identification.]

Q Would you describe your participation in the work which went into writing [this book and having it published] [fol. 109] lished?

A Well—

Mr. SUCHECKI. Objection, your Honor.

The COURT. I think that the ground has been covered sufficiently in general. I think now it is about time for you to find out exactly how far I am prepared to go in connection with the proffer you made in the most general terms when you were at the bench.

Q With respect to the purpose to which you have testified of the Consultative Council, was any portion of this book published in some form other than this book?

A Yes. The major arguments of the book were reproduced in a shorter pamphlet that was introduced into the Congressional Record several times and a shorter summary than that was reproduced as a full-page advertisement in the New York Times. In addition, there were several news stories and magazine articles about the work of the Lawyers Committee and specifically the Consultative Council.

Q Do you recall approximately when it is that the full-page ad in the New York Times appeared?

A I think the principal ad in the New York Times [fol. 110] appeared in 1967.

Q Do you recall what time of the year in 1967?

A I think late Spring.

Q Do you recall the substance of what was published in the New York Times?

Mr. SUCHECKI. Objection, your Honor.

The COURT. Well, I take it that the object of this line of testimony is to show that the views expounded by Professor Falk appearing in the New York Times would



in all probability have reached the defendant as a regular reader of the New York Times. Is that the object?

Mr. FLYM. Yes, your Honor.

The COURT. Well, if the Jury wants to draw that inference they have enough on which to draw it now without the text of the particular advertisement.

Mr. FLYM. Your Honor, I believe a portion of this book sets out the language verbatim of what was in fact published.

The COURT. That may be true, but there is nothing to show on the present state of the record that the defendant read that specific language. He has merely said [fol. 111] that he read the Times regularly, and many regular readers of the Times would hardly say they read all the advertisements.

Q Do you recall whether this advertisement appeared on a week day or on a weekend?

A It was published in the fourth section of the Sunday Times.

The COURT. There is nothing so far to show that the defendant was a diligent reader of advertisements in part 4 of the New York Times.

Mr. FLYM. Your Honor, the defendant—

The COURT. There are many advertisements, some full-page and some shorter, which some read and other don't.

Mr. FLYM. Your Honor, I believe the defendant explicitly testified that as sources of his belief he referred to the work of the Lawyers Committee, on the one hand, and to Professor Falk's book.

The COURT. If he has read it and that be germane he is the man to say it and not you. That is to say, if he has already said it, the Jury may believe it. He certainly wasn't shown any particular document and asked whether he had read that. Don't you think you had [fol. 112] better come to the point which you discussed at the bench 40 minutes ago?

Mr. FLYM. Yes. I offer this book in evidence, your Honor, as showing the reasonableness of the belief held by the defendant with respect to the legality of the war in Vietnam, not on the question of legality as such.



I believe the defendant has testified with respect to the basis for his belief, that this book is an accurate representation of the kinds of sources of information which he relied upon in forming his belief.

Mr. SUCHECKI. Objection, your Honor.

The COURT. The objection is overruled. The jury is reminded that the document was not offered to show that the Vietnam war was unlawful but merely to show that reasonable people might reasonably believe it was unlawful.

Mr. FLYM. No further questions.

The COURT. Is there any cross examination?

Mr. SUCHECKI. No, sir.

The COURT. You are excused. Is there any other evidence for the defendant?

Mr. FLYM. Yes, your Honor. We have three more [fol. 113] witnesses.

The COURT. If this is another expert on reasonableness, it would be reasonable to be briefer with respect to the expertness.

Mr. FLYM. Your Honor, if his expertise will be stipulated to by counsel—

The COURT. Let us hear it in general but not with the great detail we heard it with the last witness.

[fol. 114] HOWARD ZINN, Sworn

*Direct Examination*

Q [By Mr. Flym] Will you please state your name and address?

A Howard Zinn, 24 Joy Street, Newton.

Q What is your occupation, Mr. Zinn?

A Professor of Government, Boston University.

Q What is your educational background?

A My undergraduate work was at New York University, my M.A. in History and Political Science was at Columbia University and my Doctorate in History and Political Science was at Columbia University and I had post-doctoral work at the Center for East Asian Studies, Harvard University.

Q Would you name the books you have written?

A *LaGuardia in Congress*, *SNCC: The New Abolitionists*, *The Southern Mystique*, *New Deal Thought*, which I edited.

The COURT. I suppose you really mean to ask questions which relate to this particular subject, the American involvement in Vietnam, is that right?

Mr. FLYM. Yes, your Honor.

The COURT. We don't care about your general expertness in other fields at this particular time.

[fol. 115] A The last two books, I suppose, are more specifically with regard to Vietnam, *Vietnam: The Logic of Withdrawal*, and the other is called *Disobedience and Democracy*.

Q Is this the book you have referred to, *Vietnam: The Logic of Withdrawal*?

A Yes.

Mr. FLYM. May this be marked for identification, your Honor?

The COURT. Yes, Exhibit C for identification.

[*Vietnam: The Logic of Withdrawal* marked Defendant's Exhibit C for identification.]

Q Would you describe the work which you did with respect to this book, the writing and publishing of this book?

The COURT: Were you an author of part of it?

The WITNESS. Excuse me?

The COURT. Were you an author of part of it?

The WITNESS. I'm sorry but—

The COURT. Were you an author of part or all of the book?

The WITNESS. Yes, I was the author of all of the book.

The COURT. Well, isn't that sufficient?

Mr. FLYM. Yes, your Honor. It is sufficient for the purpose of establishing that he wrote it, your Honor. [fol. 116] It does not really afford anyone a basis for concluding that he did anything before he wrote it.

The COURT. All right.

Mr. FLYM. He might have been up in his attic.

The COURT. On what basis did you write what you wrote?

The WITNESS. I was up in the attic for a while but I also did a good deal of research. I read the standard histories of Vietnam, the American policy in the Far East. I read articles in scholarly journals and kept a clipping file of newspapers and read Government documents and went through the Senate Hearings on Vietnam.

The COURT. In short you relied on hearsay? You were not in Vietnam and you have not been a party to any negotiation of any treaty, is that right?

The WITNESS. I have been a party to negotiations.

The COURT. Have you been in Vietnam?

The WITNESS. I have been in Vietnam.

The COURT. How recently?

The WITNESS. That was about one year ago.

The COURT. In connection with any military or like operation?

The WITNESS. Yes.

[fol. 117] The COURT. Before you wrote the book?

The WITNESS. No. This was after I wrote the book.

The COURT. The materials upon which the book was based were hearsay of a scholarly research nature, is that correct?

The WITNESS. Yes. The book was based on research.

The COURT. Of a hearsay nature, is that correct?

The WITNESS. If by hearsay—

The COURT. Hearsay means not based upon personal observation of the events ultimately involved.

The WITNESS. It was not based on personal observation of events in Vietnam, that is true.

The COURT. I think I understand his qualifications, and I have no doubt that on the same basis as I admitted Exhibit B I am going to admit Exhibit C, and I have no doubt the Government is going to object.

Mr. SUCHECKI. Yes.

The COURT. And I have no doubt I am going to caution the jury in the same terms I did the last time. Now if you want to go through any further detail, that is up to you.

Mr. FLYM. Only a few brief questions, if your Honor [fol. 118] please.

Q Have you ever been invited by the University of Indiana to speak?

A Yes.

Q How recently were you invited?

A About last spring of 1968.

Q What were the circumstances?

A Dean Rusk appeared at the University.

The COURT. I don't assume you were invited by Dean Rusk, were you?

The WITNESS. No.

The COURT. Well, it is exactly as I did not invite him here. He is here in my presence and I neither endorse him nor reject him, and I don't assume that Dean Rusk did either in Indiana. He happened to be in the same room for good reason. That's all.

Mr. FLYM. One final line of questioning which may mean one question, your Honor.

Q What efforts have you made to publicize your conclusion with respect to—well, as set forth in your book?

Mr. SUCHECKI. Objection, your Honor. It is irrelevant.

The COURT. I will allow him to answer whether or not you did put it into the *New York Times* in capsule or [fol. 119] other form.

The WITNESS. I have tried in various ways, yes, speaking and writing.

The COURT. Through letters and otherwise to the *New York Times*?

The WITNESS. Excuse me?

The COURT. Through letters and otherwise to the *New York Times*?

The WITNESS. No, specifically not through letters of mine to the *New York Times*.

The COURT. Through advertisements?

The WITNESS. I have signed advertisements.

The COURT. Well, if the jury thinks that is enough, that is up to the jury.

Q Have you given any talks about your views?

A Yes, I have.

Q At colleges and universities?

The COURT. Well, just a moment. That has no bearing unless you can show the defendant himself in some way was informed and present or informed and absent.

Mr. FLYM. Your Honor, I believe the defendant expressly referred to Mr. Zinn in his testimony.

The COURT. That has already been covered. Mr. Zinn cannot add to that. The question is whether the [fol. 120] defendant knew Mr. Zinn, not whether Mr. Zinn knew the defendant.

Mr. FLYM. Yes, your Honor. Based on your Honor's prior ruling, I take it that Mr. Zinn's book is in evidence?

The COURT. The Government objects to the admission of Exhibit C for identification.

Mr. SUCHECKI. Yes.

The COURT. For the same reason as before?

Mr. SUCHECKI. Yes.

The COURT. And the exhibit is admitted for the limited purpose of showing that reasonable men may have the view which the defendant has, that it is unreasonable for us to be involved in the Vietnam War and contrary to law, international and domestic, unjust and immoral. This does not mean that the war is any of those things. It merely means that reasonable people may be found by the jury to hold that view.

Mr. FLYM. Yes, your Honor. No more questions.

Mr. SUCHECKI. No questions, Your Honor.

Mr. FLYM. Mr. Burns.

FRANCIS P. BURNS, Sworn

*Direct Examination*

Q [By Mr. Flym] Would you please state your name [fol. 121] and address?

A Francis P. Burns, 305 Broadway, Cambridge.

Q What is your occupation, Mr. Burns?

A Election Commissioner, City of Cambridge.

Q Are you the custodian of the records with respect to the Elections Commission in Cambridge?

A That is correct.

Q Do you have records with respect to a referendum which was posed to the voters of the City of Cambridge in 1967?



A I have the record the summons required me to bring along with a copy of the ballot.

Q May I see a copy of the ballot used with respect to that referendum question?

A Yes, sir.

Mr. FLYM. May this be marked for identification, your Honor?

The COURT. It may be marked for identification only.

[Specimen Ballot, Initiative Petition, Official Ballot, Cambridge, November 7, 1967, marked Defendant's Exhibit D for identification.]

Mr. FLYM. May I inquire about the results of the election?

[fol. 122] The COURT. No, you may not over objection. There being objection, you may not.

Mr. FLYM. May I make an offer of proof, your Honor?

The COURT. You may make a statement in the form of an offer of proof at the bench but not in front of the jury.

[Conference at the bench between Court and counsel as follows:]

Mr. FLYM. Your Honor, we would offer to show that 39 per cent of the voters of the City of Cambridge voted in favor of this.

Mr. SUCHECKI. Objection.

The COURT. Well, the offer of proof is noted. The proof is declined.

[End of conference at the bench.]

Mr. FLYM. No further questions.

The COURT. Is there any cross-examination?

Mr. SUCHECKI. No, sir.

The COURT. You are excused, Mr. Burns. Is there any other testimony for the defendant?

Mr. FLYM. One more witness, Your Honor.

[fol. 123] CHARLES STYRON, Sworn

*Direct Examination*

Q [By Mr. FLYM] Will you please state your name and address?

A Charles Styron.

The COURT. I did not get the last name.

The WITNESS. Styron, S-t-y-r-o-n. I live on Bedford Road, Lincoln.

Q What is your occupation?

A I am Minister of the First Parish Church.

The COURT. Are you properly addressed as Dr. Styron?

The WITNESS. Mister is sufficient, sir.

Q Do you know the defendant John Sisson?

A Yes, I do.

Q How long have you known him?

A Almost all of his life. All of the time he has been a resident of Lincoln. I have been a resident for 33 years, so essentially all of his life.

Q Do you know his reputation for truth and veracity?

A Yes, I do.

Q What is that reputation?

A It is excellent. He is known—

[fol. 124] The COURT. That is sufficient. You can testify only as to his reputation, and you have said it is excellent, which I suppose, is comprehensive.

Mr. FLYM. No further questions.

The COURT. Is there any cross-examination?

Mr. SUCHECKI. No, sir.

Mr. FLYM. That completes that defendant's presentation.

The COURT. Is there any rebuttal?

Mr. SUCHECKI. No, sir.

The COURT. I will give you a five minutes' recess and then you will address the jury.

Mr. FLYM. Your Honor—

The COURT. The jury is excused.

[The jury leaves the courtroom at 3:10 p.m.]

[Conference at the bench between Court and counsel as follows:

Mr. FLYM. Your Honor, I move for a directed verdict of acquittal.

The COURT. Denied. I will allow you to make the limited argument that you suggested at the bench when you were here with Mr. Mansfield. I do not intend to allow you to go beyond that. I think it is reasonable that you should be allowed to make that argument to the [fol. 125] jury. I will define willfully as I indicated in several previous memorandua and in accordance with what I understand to be the unanimous opinion of all the courts before which this question has been drawn in connection with this particular statute. The cases are legion. It is unnecessary to cite them. They exist in this District and outside this District and throughout the country as a whole.

Mr. FLYM. Yes, your Honor. Your Honor, I would raise a question with respect to our last request for instructions.

The COURT. Do you mean the jury has the freedom to act contrary to law? If you tell them that I shall rap you over the knuckles.

Mr. FLYM. I don't mean that at all. I mean something much more limited.

The COURT. What is that?

Mr. FLYM. Simply that they are ultimately responsible for the duty to convict or acquit.

The COURT. I will tell you that the way you just said it sounds all right. The way it was embraced by other ideas in written form was not all right, and I think that you and I both know that the line is close, and we shall both be aware when you go over it.

[fol. 126] Mr. FLYM. If I am aware of it, I certainly won't go over it.

[End of conference at the bench.]

[Recess.]

3:25 p.m.

The COURT. You may proceed on behalf of the defendant.

Mr. FLYM. Ladies and gentlemen of the jury, this case has obviously been a very short one. It commenced

about ten o'clock this morning. Five and a half hours have elapsed, including a break for lunch, so it has taken probably no more than four hours, including conferences with the Court, a number of witnesses being called, and the evidence was simple. I don't think there are very serious questions of fact as such, although you are the judges of the facts, and it is your province to acquit or to convict the defendant.

The role of counsel in these cases is to present the evidence from the witnesses, and that has been done. The role of the Court is to guide the proceedings and to instruct you as to what the law is, and you apply the facts and the law and decide whether to convict or to acquit the defendant.

What are the issues of fact? There is one issue of [fol. 127] fact. He refused to submit to induction. He said so. He is not denying it. He didn't run away when he was ordered to report for induction. He went to the military base. He did everything that he was told to do, and he refused to step forward when he was told to step forward.

You heard the testimony of Lt. Godin, who said, "I warned him about the consequences but he persisted. I told him he would be indicted, that he would be prosecuted and that he would probably be found guilty, but he refused to step forward."

What is the question of fact then that remains under the instructions that will be given to you by the Court? The question of fact revolves about the requirement that the defendant acted willfully in refusing to submit to induction. What does it mean to act willfully? The Court will instruct you. Nothing that I say is evidence. Nothing that I say can be taken as the law with respect to this case. But what does willfully mean with respect to a statute that reaches out to someone who is down in Mississippi as a reporter on the Southern Courier, who graduated from Harvard College, who considered going to graduate school but then quit, according to his testimony, because he didn't want to be deferred as a 2-S. [fol. 128] He didn't want to cop out.

You heard the testimony of the defendant, and he said, "The system of Selective Service is fundamentally

unfair. I am not going to participate in that system. I am not going to be one of the ones who gets deferred as a graduate student while the people who are less privileged, the poor, the disadvantaged, they go off to Vietnam" but he doesn't.

He chose to quit graduate school. As a matter of fact, prior to that point in time he trained for the Peace Corps and that terminated.

Subsequently, he requested a Form 150 to file a formal claim as a conscientious objector. On the basis of conscience he opposed the war and the war effort and he got the form, and the form said, "Do you oppose war in any form on the basis of your religious training and belief?" He got this form and he struggled with it and he couldn't answer that question, so he didn't send it back. Filling out a form is a simple matter. We do it all the time. For somebody who wants to stall the process of induction, it just isn't very difficult to somehow articulate some concept you pick up in one of these—well, you have groups and they counsel people. He could have filled out the form probably, mouth something, have the local board consider [fol. 129] his claim and mark time on the basis that he has a conscientious objection which is based on religious training and belief, but he didn't do that, and so he was classified 1-A.

He was ordered to report for induction, and he refused to step forward. Did he do it willfully? The definition of terms such as willful, such as intent, is a highly complex question. What does it mean? You don't need to be a college graduate or a PhD in philosophy or a psychoanalyst to know that the question, "Did you intend to do such-and-such?" is not easily answered. Does the question, "Did you intend?" mean that that is the only thing you had in mind? Does it mean that somehow you had a cup of coffee in the morning and it upset your stomach and therefore you refused to step forward?

Does it mean you had a fight with your parents? Does it mean you're sorry because you lost a buddy in Vietnam?

What does the question of intent mean? What does the word willfully mean, as the Court will instruct you?

Let us turn the question around and focus at what hap-



pened about the 30 years ago in another country, in Germany, when a government, on the basis of appearances, lawfully constituted, ordered its people, its young people, [fol. 130] to serve in the military and to prosecute a war, and ordered them to do. "You will fight this war. You will march into Poland. You will march into France and into Great Britian and into Russia."

They were ordered to fight. Is the better man the fellow who submitted to constituted authority in Germany back 30 years ago, or is it the man who through his conscience took the trouble to look at the facts and to come to his own conscientious decision and refused to participate in the system?

I think the question with respect to that question is a rhetorical one. It doesn't take much conscience to decide that the systematic elimination of 6 million Jews is something so horrible that a man ought not obey an order that he participate in that kind of a conflict.

What about the Vietnam conflict? Are we systematically eliminating 6 million Jews? No, obviously we are not. Are we doing something which can be reasonably thought to be illegal and objectionable?

You had two expert witnesses, Prof. Zinn and Prof. Falk. Prof. Falk's life is dedicated to the question of international law. Bear in mind his testimony and Prof. Zinn's testimony is not with respect to whether the war in Vietnam is illegal. That is not the issue before you. [fol. 131] That is not the basis of the defense.

The question is whether reasonable men, a man in Germany 30 years ago, a man in the United States today, doing everything that he can to conscientiously function as a citizen in society should inform himself not necessarily by going to law school or by consulting a lawyer, but by reading the newspapers, by reading what books he can get his hands on, maybe these two books [Indicating].

Just read the Table of Contents, particularly of "Vietnam and International Law." Read the captions and see if you can conclude anything other than that a reasonable man could indeed hold the view that the war is illegal.

Well, assuming that that is true, assuming a reasonable man functioning in this society—of course, we have

freedom of the press and freedom of speech. What does freedom of the press mean? What does freedom of speech mean? Do they mean anything if they don't mean a man is entitled to listen and to read and to come to his own judgment, to make his own conclusions? What point is there to having these books published and newspapers and freedom of the press, people speaking, what point is there to it if a man can't listen and be persuaded?

[fol. 132] These books, I submit, establish beyond any doubt that a reasonable man could hold the view that the Vietnam War is illegal. What does that have to do with this defendant? This defendant testified that the reason he refused to step forward is because he considered the war to be an aberration, the Vietnam War. He considered it on a par—he didn't say so, you can come to your conclusion on the basis of what he said, but essentially he put it on a par with what the Nazis were doing 30 years ago. He said, "I can't take any part in this."

These books establish that that is not an unreasonable belief. Take a man in that situation. He testified he has no criminal record of any sort. He goes to some school, grows up in Lincoln, goes off to college, gets an 2-S deferment. That's routine. And then he is suddenly confronted with this. He reaches a certain age and the Government reaches out and plucks him and says, "We want you," and he suddenly is faced with a crisis of conscience. He is faced with a decision, with the necessity of making up his own mind as to what kind of a war it is that we are fighting in Vietnam.

So he informs himself, and he reaches the conclusion that the war is a bad war. He can't participate. He goes down to the Army Base. The Lieutenant says, "Step [fol. 133] forward." He says, "I can't do it." The Lieutenant says, "Step forward" to nine people on that day, and maybe 48,000 in a month all over the country. Two hundred and sixty-four members of the defendant's local board were classified in a period of three hours. That is one of the exhibits, the first exhibit for the defendant. Two hundred and sixty-four people were considered by the local board.

The local board is made up of a few laymen. They do their best. They have their job to do. They have to provide manpower. They have got 264 names. We have 11 pages of them. They consider these 264 names. Three hours elapses. They don't tell these people—maybe they do, I don't know that—but one among the 264 is John Sisson, and they say, "John Sisson, report." So he reports. The Lieutenant says, "Step forward." He refuses.

The Lieutenant says that he tried to find out why John Sisson refused. John doesn't remember that conversation, particularly he doesn't remember claiming that he had a religious belief about the war, his conscientious objection to it, and the Lieutenant didn't report any such conversation. The question for you based on these facts is whether John Sisson did what he did willfully.

[fol. 134] When you consider that he takes seriously—not everybody takes them seriously, but he takes seriously the Nuremberg principles. The Nuremberg principles, he testified, say, "You can't use as an excuse the fact that you go out and participate in a Nazi war effort, the fact that you were told to do that." He believed that. "Either I have to do what is fundamentally wrong or else I have to refuse to submit to induction and maybe I will be convicted and be labeled as a felon," a very, very serious charge punishable—well, punishment is not up to you. The Court has discretion. The possible punishment is five years and a \$10,000 fine.

Now is this fellow a felon? Is this defendant the kind of person—

Mr. SUCHECKI. Objection, your Honor.

The COURT. It is improper to refer to a penalty, the scope of which depends upon the Court and as to which neither the jury nor counsel at the present time can have any idea at all.

Mr. FLYM. I beg the Court's pardon. Please forgive me. I didn't mean to say anything improper.

The COURT. You are quite right to point out that it is a serious crime for which the maximum punishment [fol. 135] is five years, and that you may say and nothing more.

Mr. FLYM. Yes. The question is whether this man is a felon. Do you want to punish people for doing what

they think is really right? Is that what justice is all about? Can it possibly be the meaning of the word willful? Can it possibly mean that somebody who does what he fundamentally thinks is right to avoid what is repulsive must be punished as a felon?

Is this what this country is all about? Let me suggest that if it is we don't have the kind of escape valve that we ought to have.

If people do what they think is fundamentally right and take the trouble to inform themselves, who hold opinions which can reasonably be held, I suggest that these people ought not be punished as felons.

I suggest that on the basis of the evidence you should acquit John Sisson because he did not do what he did willfully, if you interpret the word willfully in a reasonable manner.

Thank you.

The COURT. Mr. Suchecki.

Mr. SUCHECKI. May it please the Court, Mr. Foreman and members of the jury. As you all know, we all have different functions in this courtroom. Defense counsel and myself are advocates. It is our responsibility to present to you as fairly and as forcibly as possible what we think the facts are in this situation. We would be derelict in our duty if we did not do that, to point out to you what we think the facts are. We also try to suggest to you what inferences to draw and what inferences may be drawn from the facts you heard.

It is basically, as his Honor will make quite clear, that you are asked to decide the case on the evidence as you heard it and on the law as his Honor explains it to you. That is our function. We are the advocates. His Honor tells us what the law is. You, the jury, find the facts.

What are the facts in this case? When the Government opened its case it told you that you would be able to find on the evidence that the defendant was subject to the lawful and valid orders of his draft board, and we proved that; that you would be able to find that the defendant had been found acceptable for induction into the armed forces of the United States after a physical examination and a mental examination, and we proved that.



You will be able to find that the defendant failed, neglected and refused to perform a duty required of him in the execution of the Military Selective Service Act of [fol. 137] 1967 in that he failed, neglected and refused to comply with an order made by his local board to submit to induction in the armed forces of the United States. We respectfully submit we have proved that.

We believe that on the evidence we have shown you he knew he wasn't complying with the order. This wasn't something that happened without his knowing about it. This was something he did, if you can remember my questions on cross-examination, of his own choice, his own volition. He did it deliberately. It was something he thought about and did. He did it with the purpose of not submitting to the order.

Now as we go over these facts, without rehashing the entire case to you, it is quite clear that the various steps, the various forms that you will see in the jury room will show you that the local board followed the procedure that it did, that he knew what he was supposed to do and he didn't do it.

One of the defenses we heard was that after all he didn't believe in deferments, that this was an unreasonable distinction between people. Let us examine that proposition.

Here we have a boy who went to an exclusive prep school, who went to one of the most famous universities [fol. 138] in the world, Harvard, who lives in one of the finest suburbs of Greater Boston, Lincoln, Massachusetts.

The COURT. Would you say you are engaging in impermissible prejudicial conduct?

Mr. SUCHECKI. I am trying to draw an inference from—

The COURT. It makes no difference whether he lives in Roxbury or in Lincoln, or whether he went to Harvard or to Howard.

Mr. SUCHECKI. However, he did say he was opposed to deferments. I believe, if I recollect the evidence correctly, there was some statement as to—and it is your recollection that counts and I don't remember whether it was in the argument but I think it was in the evidence—



that there was some feeling he had for those that were poor; that he as a student in college couldn't accept deferment in the Architectural School as 2-S. Yet if we examine the classification questionnaire, and you will remember I asked Mr. Sisson, "Did you receive a class 2-S deferment on October 6, 1964?" He did. And he didn't appeal that. Did he receive a class 2-S deferment on October 11, 1965? He did. And he did not appeal that. Again on November 7, 1966 a 2-S. Again on June 19, 1967 2-S.

[fol. 139] This goes to the point of intent, of doing something willfully. His Honor will explain to you that motive, why someone did something doesn't enter into the picture. What we are talking about is that he did receive an order to submit to induction in the armed forces of the United States. He received a notice of classification, Selective Service Form No. 110. In that form he was told that he had the right to personal appearance and appeal. He had another form 217 mailed to him, the registrant, on November 21, 1967.

We are now talking on the date following which he was classified 1-A. There was no request for a meeting with the Government Appeal Agent. There was no request for a personal appearance before the Board. There was no appeal from the Board's decision. None of the normal processes of the Selective Service System which obviously he knew about as an educated man. We can draw that inference by reading that form. None of this was used by the defendant. He was told to report in the orders that he received after being found physically and mentally qualified. At the last minute he decided he would not do so. He did this deliberately. He did this knowingly. He did it willfully. He knew the consequences. He told us that on the stand.

[fol. 140] And despite all of this, he refused to take that step forward. Not having taken that step forward, we submit in view of all the evidence before you that you should be able to find beyond a reasonable doubt that the defendant at the armed forces entrance and examining station at Boston, Massachusetts, on April 17, 1968, refused to take the traditional step forward, indicating

his submission to induction, and having examined all the evidence we are convinced that you will be able to find beyond a reasonable doubt that the defendant is guilty as charged.

Now I must tell you that the Government wins in every case, in every case when justice is done, and that is all we ask you to do, Mr. Foreman and members of the jury, to do justice in the case of United States of America against John Heffron Sisson, Jr.

Thank you.

### [fol. 141] CHARGE TO THE JURY

Mr. Foreman and members of the Jury, this being the first criminal case on which you have sat, I shall begin with some general instructions which are not peculiar to this criminal case but which operate in almost all criminal cases.

When the government believes that a serious crime may have been committed under the Constitution of the United States the United States Attorney is authorized to go before a Grand Jury to see if he can get an indictment, but an indictment is by no means evidence in any case. It is merely a charge made by a group of persons, the so-called Grand Jury, who ordinarily have heard only government counsel and government witnesses, rarely, if ever, the defendant and, I think I can say, never defendant's counsel. You are the first Jury that will have heard this case. The indictment does nothing but specify the particular complaint which you are hearing.

Every defendant enters the courtroom with the benefit of the presumption of innocence. The government and the government alone has the burden of proof and it must prove every essential element of the crime charged beyond a reasonable doubt. That means that the government must [fol. 142] prove to a moral certainty every essential element of the crime. You must be persuaded as you would want to be persuaded of the most important concerns of your life.

In a criminal case, as in a civil case, the Jury is the judge of the facts in the case. Your recollection of the testimony is what counts and not what counsel or I remem-

ber or believe we remember. It is you and not counsel or the Court that determines issues of credibility. You are to decide which witnesses you believe, if any, and how much of their story, if any, you believe. You will apply the usual tests of common sense. There are no sovereign rules of law to guide you. Mr. Justice Brandeis, when he was a lawyer, used to say, "You ought to inquire as to what the witnesses' opportunity had been to observe, how accurate his memory was, how clearly he could tell a story and whether he could recognize the connection between his bit of evidence and the whole case. And, of course, it is always important to take into account the bias or prejudice of a witness. Every party who is a witness is naturally prejudiced in favor of himself. Other witnesses may or may not be also prejudiced.

So far as concerns questions of law, you are to take your instructions from the Court. Every Judge, not least this one, makes mistakes of law. But mistakes of law are to [fol. 143] be corrected by the Court of Appeals or, if necessary, by the Supreme Court of the United States. They are not to be corrected by you. It might be that some of you are better at the law than the Judge, but we couldn't tell what you were doing about the law if you did it in private in the Jury room, and everybody is entitled to know clearly what are said to be the governing principles of law. As I said, I may make a mistake but you are not to correct me on my mistake of law.

This case, as you will recall, began with an indictment in which the Grand Jury charges as follows: That on or about April 17, 1968, at Boston, in the District of Massachusetts, John Heffron Sisson, Jr., of Lincoln, in the District of Massachusetts, did unlawfully, knowingly and wilfully fail and neglect and refuse to perform a duty required of him under and in the execution of the Military Selective Service Act of 1967 and the rules, regulations and directions duly made pursuant thereto, particularly 32 Code of Federal Regulations 1632.14, in that he did fail and neglect and refuse to comply with an order of his local draft board to submit to induction into the armed forces of the United States; in violation of Title 50, Appendix, United States Code, Section 462.

I read this to you at the opening, and you will take this [fol. 144] indictment with you into the Jury room, and from the arguments addressed to you you will realize that the critical words as to which you are particularly cautioned to exercise your good judgment are the words "unlawfully, knowingly and wilfully." I shall define those words in due course but I want to put this indictment in its setting.

The Selective Service Act, or more technically as it is called the Military Selective Service Act of 1967, is a very long statute and it has been reproduced in 50 United States Code Appendix, and in particular part of it appears in Section 462, which is referred to in the indictment. So far as it is material that sections says: "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title," that is the Selective Service Act, "or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty," and so forth, "shall be punished" as provided in the statute, subject to the discretion of the Court in accordance with the usual principles.

Now there are many regulations which have been adopted pursuant to the Military Selective Service Act. They relate to the duty to register, for example, within so many days after you reach your 18th birthday. They [fol. 145] relate to the filling out of various forms and the opportunity to claim conscientious objection and the like. They relate to physical and mental examinations and the like. They cover topics of appeal and the like. You have heard reference to many of them.

So far as this case is concerned, the only one of the numerous regulations which I think it might be worthwhile to read to you is the one with reference to induction. That is the one which is particularly referred to in the indictment as 32 Code of Federal Regulations 1632.14. It reads so far as material: "When the local board mails to a registrant an Order to Report for Induction or an Order for Transferred Man to Report for Induction, it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the



registrant is ordered to report for induction is postponed, it shall be the continuing duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each [fol. 146] local board whose area he enters or in whose area he remains.

"Upon reporting for induction, it shall be the duty of the registrant (1) to follow the instructions of a member or clerk of the local board as to the manner in which he shall be transported to the location where his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction, (3) to appear at the place where his induction will be accomplished, (4) to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished, (5) to submit to induction, and (6) if he is found not qualified for induction, to follow the instructions of the representatives of the Armed Forces as to the manner in which he will be transported on his return trip to the local board."

If you listened attentively to the case and if your recollection is the same as mine you will recall that the government offered rather elaborate evidence which no one tried to shake in cross examination that the defendant in this case did register, was classified, did have an opportunity to fill out a form 150 with respect to conscientious objection, did not do so, was ordered, as shown in Exhibit 11, to report on a day certain to his local board, that he did report to the local board, that he then went with other [fol. 147] men to the appropriate Boston place where a representative of the Armed Forces was prepared to induct him, and that then, according to his own statement, the defendant did not submit to induction, that is, he did not take the symbolic step forward which under the practice constitutes acceptance of induction.



I think that no one up to this point could find any dispute between the parties as to what were the facts. But the question which obviously has led to this trial is that the government claims that in his action or failure to act, his failure to step forward, the defendant was acting or refusing to act unlawfully, knowingly and wilfully. So the crux of the problem is was the defendant's failure to submit to induction unlawfully, knowingly and wilfully done? The words "wilfully and knowingly" have been defined with absolute unanimity in a series of cases in the Federal Courts. The definition was given in the predecessor statute to the present 1967 Selective Service Act, and aware of the construction put upon this language Congress as it were reenacted the Selective Service Act of 1967, and I instruct you as a matter of law that until we are told otherwise, if we ever are told otherwise, by the Supreme Court of the United States the words "unlawfully, knowingly and wilfully" as used in this indictment, [fol. 148] in these regulations and in this statute mean deliberately, intentionally, knowingly. And it makes no difference whatsoever if the defendant has the finest motive in the world, it makes no difference whatsoever whether as a matter of reasonable belief he thought a particular war was or was not contrary to an international obligation, contrary to the Constitution of the United States, contrary to good order, morals, justice or any ethical or other consideration.

The only question which as a matter of law a Jury has a right to consider is whether the defendant if he failed to perform an act required under the statute and regulations was acting knowingly in the sense of with mental awareness, wilfully in the sense of intentionally and with free choice.

He may have all the views he likes of a political, ethical, religious or legal nature. They may be as reasonable as sometimes dissents of the Supreme Court are reasonable and sometimes the majority Opinions are reasonable, but as long as the law stands as it now stands his motivation, his good faith and the like are not in the least relevant to the question whether he is guilty or not.

Now let me make it clear, because counsel undertook, I am sure unintentionally, to speak about penalties. Penalties are the function of the Judge in most cases. Since [fol. 149] counsel have chosen to refer to this matter, I am going to tell you that any Judge who is worth his salt when he comes to determine the penalty may take into account a great many considerations which a Jury cannot take into account in determining the fact as to whether a man is guilty or not guilty, but those are not your concerns. You are here to apply the law as given to you by the Court.

Now there are some things that I think in justice to the defendant I ought to say because you might have derived the wrong impression. He told you he was deselected from the Peace Corps and it was not brought out, as perhaps it should have been, that there is no odium with respect to that. There is nothing like the equivalent of a dishonorable discharge. It just happened to be the fact he was not selected. Some of us are selected as judges and some are selected for the Peace Corps and some are not. It has nothing to do with the matter.

I think it is also my duty to point out to you that, as he prefers to be called, Mr. Styron, the minister, was testifying as to the character of the defendant in connection with his reputation for truth and veracity, if they be different. Any defendant in any criminal case has a right to call such witnesses who testify to his reputation for truth and veracity. That is a factor which you are entitled to take into account. I do not want you to be misled into thinking that because Mr. Styron is a clergyman somehow indirectly there gets into this case conscientious objection on religious belief. There is no such issue in this case.

You will remember that although he was afforded the opportunity to fill out a form 150 with respect to conscientious objection, this defendant never asked either administratively or indeed even here to be treated as a religious conscientious objector. No such issue is here.

Now I would be less than candid with you if I did not say that I know that in the Jury box, as in the courtroom, there are men and women who politically disagree

with the conduct of our affairs in Vietnam, who think we ought not be there, or who think we are not conducting ourselves in a proper way, or who think that world peace would be furthered if we would get out. Politically those are perfectly rational propositions. They have nothing to do with the problem before you. If you allow yourselves to vote a political ballot in a Jury room, you are false to your oath. All you have to decide is whether the government has proved beyond a reasonable doubt each of the essential elements of the indictment before you.

Have I omitted anything?

[Conference at the bench between Court and Counsel as follows:

[fol. 151] Mr. FLYM. The only additional request I would make, in addition to the requests which have been denied by your Honor, which we previously submitted, would be that the instruction your Honor gave that reasonable belief, insofar as it touches good faith and motive, is irrelevant. I would request that that be balanced by an instruction that insofar as reasonable belief bears on the question of intent that that may be considered by the Jury.

The COURT. I have said all I want to say.

End of Conference at the Bench.]

The COURT. All right, Mr. Foreman and members of the Jury. You will take out with you the indictment and you will take out with you all the exhibits. You do not take out with you the transcript of the testimony principally because it has not been typed out. But that does not mean that you are supposed to give greater weight to the written than to the oral testimony. It is entirely up to you.

I am sure you realize that you are required to be [fol. 152] unanimous, and that in a criminal case the Foreman speaks for the Jury without any written verdict unlike in a civil case. If there are any problems which arise as to which you absolutely imperatively require instruction, I shall be here and counsel, if they are interested in knowing what I say, if you ask a question, have a duty also to be here. I do not encourage you to put questions

to me but if you must do so put them in writing, fold them in a manner so that the court officer cannot see what you have asked me, and I will consider whether to answer your question.

Every case in the Jury system presupposes that jurors are rational, reasonable people, who will listen attentively to the arguments of their bretheren. The Jury room is no place for pride of opinion, It certainly is no place for political contentiousness. You have a very solemn duty. As Daniel Webster said, "Justice is the highest interest of man on earth." And could there be a more important case than this type of case which involves, needless to say, the reputation and possibly the liberty of an individual, and involves also the general welfare and common defense of the United States? When you are ready to report your verdict you will do so.

[The Jury leave the courtroom at 4:20 p.m. and return at 4:40 p.m.]

[fol. 153] The CLERK. Mr. Foreman and members of the Jury, have you agreed upon your verdict?

The COURT. The defendant should rise. Have you agreed upon your verdict?

The FOREMAN. Yes, we have, your Honor.

The CLERK. What say you, how have you found the defendant John Heffron Sisson, Jr., guilty or not guilty?

The FOREMAN. Guilty.

The CLERK. Harken to your verdict as the Court has recorded it. You have found the defendant John Heffron Sisson, Jr. guilty. So say you, Mr. Foreman, so say you all ladies and gentlemen of the Jury.

The COURT. I assume that the government is satisfied to have him go on his own recognizance without bail?

Mr. SUCHECKI. Yes, your Honor.

The COURT. Then you may go without bail. I call to your attention and to your counsel's attention Rule 34 in Arrest of Judgment. "The Court on motion of the defendant shall arrest judgment if the indictment or information does not charge an offense or if the Court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within seven (7) days



[fol. 154] after verdict or finding of guilty or after a plea of guilty or nolo contendere, or within such further time as the Court may fix during the seven day period.

Insofar as the arguments addressed to the Court in advance of the trial suggest that because of the doctrine of *United States v. Yakus* or otherwise there is some problem as to whether this Court does have jurisdiction in criminal matters to impose a criminal punishment when a defendant is not free to raise questions relating to certain Constitutional questions or answer certain international law questions and others referred to in the preliminary memoranda, this point may or may not be renewed by a motion of the defendant in arrest of judgment provided the motion is seasonably made.

I also will state to you now and state to you later that you have a right of appeal in this matter to the Court of Appeals and in appropriate cases to the Supreme Court of the United States.

In view of the fact that you have testified that you do not have a criminal record other than traffic offenses, if any, and in view of the fact that during the course of this case much, if not all, of your prior history has come out, it would be a simple matter to prepare any report from the probation office. I will sentence you a week [fol. 155] from Monday, that is the 31st of March, at 9.30 in the morning, and I will also listen at that time to any motions which may be prepared in advance of that time which in any way relate to the verdict and judgment in this case. The Court will adjourn to—

Mr. FLYM. Your Honor—

The COURT. Yes?

Mr. FLYM. I did not want to interrupt the Court. May the Jury be polled?

The COURT. Oh, surely, the Jury may be polled.

The CLERK. Robert H. Weiser, guilty or not guilty?

Juror WEISER. Guilty.

The CLERK. Richard J. Hornbrook, guilty or not guilty?

Juror HORNBROOK. Guilty.

The CLERK. Justin H. McCarthy, guilty or not guilty?



Juror McCARTHY. Guilty.

The CLERK. John T. Burns, guilty or not guilty?

Juror BURNS. Guilty.

The CLERK. Claire G. Green, guilty or not guilty?

[fol. 156] Juror GREEN. Guilty.

The CLERK. Merle A. Lamont, guilty or not guilty?

Juror LAMONT. Guilty.

The CLERK. Donald M. Philbrick, guilty or not guilty?

Juror PHILBRICK. Guilty.

The CLERK. Esther Alman, guilty or not guilty?

Juror ALMAN. Present.

The COURT. Well, guilty or not guilty, you are asked. Guilty or not guilty?

Juror ALMAN. Guilty.

The CLERK. Mary C. Kelley, guilty or not guilty?

Juror KELLEY. Guilty.

The CLERK. Everett A. Williams, Jr., guilty or not guilty?

Juror WILLIAMS. Guilty.

The CLERK. Elaine Cribben, guilty or not guilty?

Juror CRIBBEN. Guilty.

The CLERK. Helen Davis Barker, guilty or not guilty?

[fol. 157] Juror BARKER. Guilty.

The COURT. I have another case, as you know, which I am not going to postpone, on Monday of next week. You and I know the nature of the case. You also know the size of the general jury venire. Do you want me to excuse these jurors, Mr. Flym?

You are now speaking on behalf of another client, not on behalf of this client. Are you content to have these persons in the venire? There is no use in having them come in if you are going to challenge every one of them on the ground he or she served today.

Mr. FLYM. May they be excused, your Honor?


The COURT. All right. You, ladies and gentlemen of the Jury, are excused until a week from Monday. The reason, as I can now tell you, and which you have probably guessed, is that there is another Selective Service case on Monday, and the same counsel presumably.

Mr. SUCHECKI. Yes, sir, I am, ready.

The COURT. They would like under the circumstances to have 12 other jurors, and maybe you would be content, too. At any rate, you are excused until a week from Monday. The defendant is also excused until a week from Monday, he at 9.30 and you at 10.

You may now adjourn the Court until Monday at 9.30.

\* \* \* \*



[fol. 159]

## I N D E X

Witnesses	Direct	Cross	Redirect	Recross
Paul F. Feeney	14	23		
Agnes M. Grudinski	26	46		
Alfred M. Godin	56	58		
John H. Sisson, Jr.	67	98		
Richard Falk	101			
Howard Zinn	114			
Francis P. Burns	120			
Charles Styron	123			
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2	SSS Classification Questionnaire, Form 100. ____	17
3	SSS Form 217, ADVICE OF RIGHT TO PERSONAL APPEARANCE AND APPEAL. _____	33
4	SSS Form 110, NOTICE OF CLASSIFICATION. _____	34
5	SSS Form 223, ORDER TO REPORT FOR ARMED FORCES PHYSICAL EXAMINATION. _____	38
6	Letter dated December 26, 1967 from John H. Sisson, Jr. to Local Board No. 114. _____	39
7	SSS Form 230, TRANSFER FOR ARMED FORCES PHYSICAL EXAMINATION OR INDUCTION. _____	39

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## Government

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8	STATEMENT OF ACCEPTABILITY. ....	40
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10	SSS Form 150, Special Form for Conscientious Objector. ....	42
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D	Specimen Ballot, Initiative Petition, Official Ballot, Cambridge, Mass., November 7, 1967. ....	121





114

1. NAME IN FULL Last First Middle <b>SISSON JR. John Heffron</b>			SELECTIVE SERVICE NUMBER <b>19 - 114 - 46 137</b>	
2. PLACE OF RESIDENCE Street and Number or RFD Route <b>Trapelo Road</b> City, Town, or Village County State Zip Code <b>Lincoln Massachusetts 01773</b>			3. DATE OF BIRTH <b>May 14, 1946</b>	
4. MAILING ADDRESS (If different than item 2) Street and Number or RFD Route <b>Same 2123/65, 457</b> City, Town, or Village County State Zip Code <b>Lincoln Massachusetts 01773</b>			4. PLACE OF BIRTH City: <b>Boston</b> State or Country: <b>Mass.</b>	
5. NAME and address of person other than a member of your household who will always know your address <b>Dr. John H. Sisson Same</b>			6. DATE OF REGISTRATION <b>4 June 1964</b>	
7. Description of Registrant				
COLOR OF EYES <b>Blue</b>	COLOR OF HAIR <b>Brown</b>	HEIGHT (APPROX.) <b>5 ft. 11 in.</b>	WEIGHT (APPROX.) <b>140</b>	
OTHER OBVIOUS PHYSICAL CHARACTERISTICS THAT WILL AID IN IDENTIFICATION: <b>None</b>				
Form Approved Budget Bureau No. 33-1099-7 ESS Form No. 1-A (Original) (Rev. 1-64)			SELECTIVE SERVICE SYSTEM REGISTRATION CARD	

9. OCCUPATION <b>Student</b>		10. NATURE OF BUSINESS, SERVICE RENDERED, OR CIVIL SERVICE	
11. FIRM OR INDIVIDUAL BY WHOM EMPLOYED <b>Harvard College</b>			
12. PLACE OF EMPLOYMENT OR BUSINESS <b>Cambridge Massachusetts</b>			
13. Active duty in the Armed Forces of the United States or a cobelligerent nation since Sept. 16, 1940:			
ARMED FORCE OR COUNTRY	SERVICE NO.	DATE OF ENTRY	DATE OF SEPARATION
14. Present membership in a reserve component of the Armed Forces:			
ARMED FORCE	SERVICE NO.	DATE OF ENTRY	GRADE
ORGANIZATION	I affirm that I have verified the foregoing answers and that they are true: <b>John H. Sisson Jr.</b> (Signature of registrant)		

I certify that the person registered has read or has had read to him his answers; that I have witnessed his signature or mark; and that all of his answers of which I have knowledge are true, except as follows:

**Ruth S. Davis**  
(Signature of registrar)  
Registrar for Local Board **19** (Number)  
**Cambridge** (City or county) **Mass.** (State)  
GPO: 1963-000-007

## SELECTIVE SERVICE SYSTEM

Form approved.  
Budget Bureau No. 33-2312-10

## CLASSIFICATION QUESTIONNAIRE

Local Board No. 114 Middlesex County 34 Commonwealth Ave. West Concord, Mass. 01781
--

(Local Board Stamp)



DATE QUESTIONNAIRE RETURNED

JUL 20 1964

East Concord, Mass.

Date of Listing

COMPLETE AND RETURN BEFORE JULY 13, 1964

1. Name of Registrant			2. Selective Service No.			
Sisson Jr., John Heffron			19 114 46 131			
(Last) (First) (Middle)						
3. Mailing address						
Tremolo Road Lincoln Mass. 01773						
(Number and street or R.F.D. route) (City, town, or village) (State) (Zip code)						

(The above items, except the date received back at local board, are to be filled in by the registrant or board clerk before the questionnaire is mailed.)

## INSTRUCTIONS

The Law requires you to fill out and return this questionnaire on or before the date shown to the right above in order that your local board will have information to enable it to classify you. A notice of your classification will be mailed to you. When the questions in any series do not apply, enter "NONE" or "DOES NOT APPLY."

The Law also requires you to notify your local board in writing, within ten days after it occurs, of (1) every change in your address, physical condition and occupational, marital, family, dependency and military status, and (2) any other fact which might change your classification.

Fill out with typewriter or print in ink, except signatures.

## STATEMENTS OF THE REGISTRANT

Confidential as Prescribed in the Selective Service Regulations  
Series I—IDENTIFICATION

1. Name				2. Date of birth	
Sisson John Heffron, Jr.				May 14, 1946	
(Last) (First) (Middle)					
3. Other names used (if none, enter "None")				4. Place of birth	
None				Boston, Mass.	
5. (a) Color eyes	(b) Color hair	(c) Height	(d) Weight	6. Citizen or subject of (country)	
Blue	Brown	5' 11 1/4"	140 lbs.	U. S. A.	
7. If naturalized citizen, give date, place, court of jurisdiction and naturalization number.					
8. Current mailing address					
Tremolo Rd. R.F.D. #1 Lincoln Middlesex Massachusetts 01773					
(Number and street or R.F.D. route) (City, town, or village) (County) (State) (Zip code)					
9. Telephone No. (If none, enter "None")				10. Social Security No. (If none, enter "None")	
259-8504				032-34-8964	
11. Name and address of person other than a member of my household who will always know my address					
Dr. Warren R. Sisson 20 Crafts Rd. Chestnut Hill, Mass.					
(Name) (Address)					

SSS Form No. 100 (Revised 11-20-63) Supplies of previous printings shall be used until exhausted.

(1)

40-10-7000-4

## Series II.—MILITARY RECORD

(Use Page 6, if necessary)

1. If you are now on or have been separated from active military service enter: (a) Armed Force .....  
 (b) Service number ..... (c) Date of entry .....  
 (d) Law of separation ..... (e) Character of service .....  
 (f) Type of transfer or discharge .....
2. If you are now a member of a Reserve component (including the National Guard) give: (a) Name and address of unit .....  
 (b) Service number ..... (c) Date of enlistment or appointment .....
3. If you are now a member of a Reserve Officer Training Corps or any other officer procurement program, state the program, the Armed Force, date of entry, and any identifying number .....

## Series III.—MARITAL STATUS AND DEPENDENTS

(Use Page 6, if necessary)

1. (a) I (check one): ☒ have never been married; ☐ am a widower; ☐ am divorced; ☐ am married.  
 (b) I (check one if applicable): ☐ DO ☐ DO NOT live with my wife; if not, her address is .....  
 (c) We were married at ..... On .....  
 (Place) (Date)
2. I have ..... children under 18 years of age of whom ..... live with me in my home.  
 (Number) (Number)
3. If you have no child, other than an unborn child, attach a statement from a physician showing the basis for his diagnosis of pregnancy and the expected date of birth.
4. The following other persons are wholly or partially dependent upon me for support:

Dependent	Relationship	Age	Approximate Income (Annual)	Amount Contributed by him
Name			\$	\$
Address			\$	\$
Name			\$	\$
Address			\$	\$
Name			\$	\$
Address			\$	\$

## Series IV.—REGISTRANT'S FAMILY

(Use Page 6, if necessary)

List below all the living members of your immediate family who are 14 years of age or over (except those shown in Series III) including your father, mother, brothers, sisters, father-in-law, and mother-in-law.

Relatives	Relationship	Age	Can This Relative Contribute to Support of Claimed Dependents?
Name Address Dr. John Hefron Sisson Trenton Rd. Lincoln Mass.	Father	47	<input type="checkbox"/> Yes <input type="checkbox"/> No
Name Address Barbara Blagden Sisson Trenton Rd. Lincoln Mass.	Mother	44	<input type="checkbox"/> Yes <input type="checkbox"/> No
Name Address Emilia Hefron Sisson Trenton Rd. Lincoln Mass.	Sister	17	<input type="checkbox"/> Yes <input type="checkbox"/> No
Name			<input type="checkbox"/> Yes <input type="checkbox"/> No
Name			<input type="checkbox"/> Yes <input type="checkbox"/> No
Name			<input type="checkbox"/> Yes <input type="checkbox"/> No

\* If your answer is "Yes," state extent of ability to contribute in detail on page 6.

## Series V.—OCCUPATION

(Use Page 6, if necessary)

If Engaged in Agriculture, Also Fill in Series VI

1. I am now employed as a (Give full title, for example: construction draftsman, turret lathe operator, station engineer, farm laborer, physics teacher, policeman, marriage-license clerk, etc., if unemployed, so state.)  
*Unemployed*
2. I do the following kind of work (Give a brief statement of your duties. Be specific.)  
.....
3. My employer is .....  
(Name of organization or proprietor, not foreman or supervisor. Enter "Self" if self-employed.)  
.....  
(Address of place of employment—Street, or R.F.D. Route, City, and State.)  
whose business is .....  
(Nature of business, service rendered, or chief product)
4. (a) I have been employed by my present employer since .....  
(month and year)  
(b) I am paid at the rate of \$..... ☐ Per Hour ☐ Day ☐ Week ☐ Month.  
(c) I work an average of ..... hours per week.
5. Other business or work in which I am now engaged is .....  
(Nature of business, if none, enter "NONE")
6. Other occupational qualifications, including hobbies, I possess are .....
7. My work experience prior to that described in items 1 and 2, this series, is *as a handyman for a*  
*Summary*
8. I speak fluently the following foreign languages or dialects *French*
9. I read and write well the following foreign languages or dialects *French*

## Series VI.—AGRICULTURAL OCCUPATION

(Use Page 6, if necessary)

1. I have been engaged continuously in farmwork since .....  
(Month and year)
2. I am (check appropriate box): ☐ Sole owner-operator of a farm ☐ Joint owner-operator with another ☐ Farm manager ☐ Cash tenant or renter ☐ Standing rent tenant ☐ Sharecropper ☐ Share tenant ☐ Wage laborer (hired man) ☐ Unpaid family worker.
3. I (check one): ☐ AM ☐ AM NOT personally responsible for the operation of the farm where I work.
4. The principal crops and livestock of the farm I operate or work on are:

Names of Crops	Acres Devoted to Each	Kinds of Livestock	Number of Each Now on Farm
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

5. Principal products marketed during the last 2 years .....
6. Total value of products sold from this farm during the last crop year \$.....
7. The number of year-round workers on this farm is ..... of whom ..... are hired  
(Number) (Number)
8. Other farm experience .....

### Series VII—MINISTER OR STUDENT PREPARING FOR THE MINISTRY

(Use Page 6, if necessary)

- I have been a minister of the \_\_\_\_\_ since \_\_\_\_\_  
(Name of sect or denomination) (Month) (Day) (Year)  
and (check one): ☐ HAVE ☐ HAVE NOT been formally ordained.
- I was formally ordained at \_\_\_\_\_  
on (date) \_\_\_\_\_ by \_\_\_\_\_
- I am a student preparing for the ministry pursuing a full-time course of instruction at the \_\_\_\_\_  
(Name and address of theological or divinity school)  
under the direction of \_\_\_\_\_  
(Name of church or religious organization)
- I am a student preparing for the ministry under the direction of \_\_\_\_\_  
(Name of church or religious organization)  
pursuing a full-time course of instruction at the \_\_\_\_\_  
(Name and address of school)  
leading to my entrance into \_\_\_\_\_  
(Name and address of theological or divinity school)  
in which I have been pre-enrolled.

### Series VIII—CONSCIENTIOUS OBJECTOR

(DO NOT SIGN THIS SERIES UNLESS YOU CLAIM TO BE A CONSCIENTIOUS OBJECTOR)

I claim to be a conscientious objector by reason of my religious training and belief and therefore request this local board to furnish me a Special Form for Conscientious Objector (SSS Form No. 150).

(Signature)

### Series IX—EDUCATION

(Use Page 6, if necessary)

- (a) I have completed 8 years of Grade School, 2 years of Junior High School, 4 years of High School, \_\_\_\_\_ years of Trade or Business School. I (check one): ☒ DID ☐ DID NOT graduate from High School.
- (b) I am a full-time student at \_\_\_\_\_  
and expect to graduate on \_\_\_\_\_  
(Date) (Name of high school)
- (c) In Trade or Business School I pursued courses in \_\_\_\_\_
- (a) I have completed 2 years of College, majoring in Latin American Studies  
at Harvard College, Cambridge 38, Mass.  
(Name and address of institution)  
and (check one): ☐ HAVE ☒ HAVE NOT received a degree.
- (b) I have received the following degree(s) \_\_\_\_\_  
(Degree—Date) (Degree—Date) (Degree—Date)
- I am a full-time student at Harvard College, Cambridge 38, Mass.  
majoring in Latin American Studies preparing for The Foreign Service  
(Name and address of institution) (Occupation or profession)  
and expect to receive a degree on June 1966  
(Date)

### Series X—STATEMENT OF ALIEN

- I was admitted to the United States for (check one): ☐ PERMANENT RESIDENCE ☐ TEMPORARY RESIDENCE on \_\_\_\_\_  
(Date of entry)
- My Alien Registration Number is \_\_\_\_\_  
If you have not been admitted to the United States for permanent residence, enter on page 6 a supplementary statement setting out the date you first entered the United States, with the dates of each subsequent departure and reentry when applicable. Attach copies of documentary evidence in your possession verifying your claimed alien status.



## Series XI—PHYSICAL CONDITION

(Use Page 6, if necessary)

1. If you were ever found not qualified for service in the Armed Forces state (a) when \_\_\_\_\_  
(b) where \_\_\_\_\_
2. If you have any physical or mental condition which, in your opinion, will disqualify you for service in the Armed Forces, state the condition \_\_\_\_\_
3. If you have ever been an inmate or a patient in a mental or tuberculosis hospital or institution, give the names and address of each hospital or institution, and the period of hospitalization. \_\_\_\_\_

## Series XII—COURT RECORD

(Use Page 6, if necessary)

1. I (check one): ☐ HAVE ☒ HAVE NOT been convicted or adjudicated of a criminal offense or offenses, other than minor traffic violations. (If "HAVE" box is checked, complete this series.)

Offense (other than minor traffic violations)	Date of Conviction (Month, Day, Year)	Court (Name and Location)	Signature

2. I (check one): ☐ AM ☒ AM NOT now being retained in the custody of a court of criminal jurisdiction, or other civil authority. Specify \_\_\_\_\_  
(Awaiting trial, on probation, on parole, etc.)

## Series XIII—SOLE SURVIVING SON

I (check one): ☐ AM ☒ AM NOT the sole surviving son of a family of which one or more sons or daughters were killed in action or died in line of duty while serving in the Armed Forces of the United States or subsequently died as a result of injuries received or disease incurred during such service.

## REGISTRANT'S CERTIFICATE

**INSTRUCTIONS.**—You are required to make the registrant's certificate. If you cannot read, the questions and your answers shall be read to you by the person who assists you in completing this questionnaire. If you are unable to sign your name, you shall make your mark in the space provided for your signature in the presence of a person who shall sign as witness.

**NOTICE.**—Imprisonment for not more than 5 years or a fine of not more than \$10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Universal Military Training and Service Act, as amended.)

I CERTIFY that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief.

July 13, 1964  
(Date)

Registrant  
sign here

John T. Licon  
(Signature or mark of registrant)

(Date)

(Signature of witness to mark of registrant)

If anyone has assisted you in completing this questionnaire, such person shall sign the following statement: I have assisted the registrant herein named in completing this questionnaire because \_\_\_\_\_

(For example—registrant unable to read and write English, etc.)

(Signature of person who has assisted)

(Number and Street or R.F.D. Route)

Date \_\_\_\_\_

(City)

(State)

(Zip code)

(5)

430-10-72307-0

**Series XIV.—STATEMENT OF REGISTRANT**

(Refer to Series Number)

(Use additional sheets if necessary)

---

**(Signature of Registrant)**

---

**(Date)****(6)**

30-10-75007-3





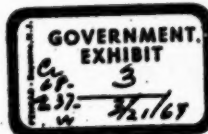


**SELECTIVE SERVICE SYSTEM**  
**ADVICE OF RIGHT TO PERSONAL APPEARANCE AND APPEAL**

Approval  
Not Required

Local Board No. 114  
 Middlesex County  
 34 Commonwealth Ave.  
 West Concord, Mass. 01781

(Local Board Stamp)



John H. Sisson Jr.,

Date of mailing			
... Nov. 21, 1967			
(Month)	(Day)	(Year)	
Selective Service No.			
19	114	16	137

Enclosed is your Notice of Classification (SSS Form 110). Your right to ask for a personal appearance or an appeal within 30 days is prescribed on the reverse side of that Notice of Classification.

Each local board has available a Government Appeal Agent to aid you with a personal appearance, an appeal, or any other procedural right. The Appeal Agent or his representative will give you legal counsel on Selective Service matters only at no charge.

If you should desire a meeting with him, this office will arrange a time and place for such meeting upon request.

.....  
 (Member or Clerk of Local Board)



This is your Notice of Classification, advising you of the determination of your selective service local board that you have been classified in accordance with Selective Service Regulations. The various classifications are described on the reverse side of this communication. You are required to have a Notice of Classification in your personal possession.

When a subsequent Notice of Classification is received you should destroy the one previously received, retaining only the latest.

(Sign here) ↑

Class I-A:	Registrant available for military service.	Class II-A:	Conditional deferment (other than agricultural and student).	Class III:	Constitutional deferment (other than agricultural and student).
Class I-B:	Registrant available for military service.	Class II-B:	Apprenticed deferment.	Class III-A:	Student deferment.
Class I-C:	Member of the Armed Forces of the United States, the Government of the United States, or the Government of the United States, or the Government of the United States.	Class II-C:	Student deferment.	Class III-B:	Student deferment.
Class I-D:	Qualified member of reserve component or reserve component of the United States, or the Government of the United States, or the Government of the United States.	Class II-D:	Student deferment.	Class III-C:	Student deferment.
Class I-E:	Registrant available for military service.	Class II-E:	Student deferment.	Class III-D:	Student deferment.
Class I-F:	Registrant available for military service.	Class II-F:	Student deferment.	Class III-E:	Student deferment.
Class I-G:	Registrant available for military service.	Class II-G:	Student deferment.	Class III-F:	Student deferment.
Class I-H:	Registrant available for military service.	Class II-H:	Student deferment.	Class III-G:	Student deferment.
Class I-I:	Registrant available for military service.	Class II-I:	Student deferment.	Class III-H:	Student deferment.
Class I-J:	Registrant available for military service.	Class II-J:	Student deferment.	Class III-I:	Student deferment.
Class I-K:	Registrant available for military service.	Class II-K:	Student deferment.	Class III-J:	Student deferment.
Class I-L:	Registrant available for military service.	Class II-L:	Student deferment.	Class III-K:	Student deferment.
Class I-M:	Registrant available for military service.	Class II-M:	Student deferment.	Class III-L:	Student deferment.
Class I-N:	Registrant available for military service.	Class II-N:	Student deferment.	Class III-M:	Student deferment.
Class I-O:	Registrant available for military service.	Class II-O:	Student deferment.	Class III-N:	Student deferment.
Class I-P:	Registrant available for military service.	Class II-P:	Student deferment.	Class III-O:	Student deferment.
Class I-Q:	Registrant available for military service.	Class II-Q:	Student deferment.	Class III-P:	Student deferment.
Class I-R:	Registrant available for military service.	Class II-R:	Student deferment.	Class III-Q:	Student deferment.
Class I-S:	Registrant available for military service.	Class II-S:	Student deferment.	Class III-R:	Student deferment.
Class I-T:	Registrant available for military service.	Class II-T:	Student deferment.	Class III-S:	Student deferment.
Class I-U:	Registrant available for military service.	Class II-U:	Student deferment.	Class III-T:	Student deferment.
Class I-V:	Registrant available for military service.	Class II-V:	Student deferment.	Class III-U:	Student deferment.
Class I-W:	Registrant available for military service.	Class II-W:	Student deferment.	Class III-V:	Student deferment.
Class I-X:	Registrant available for military service.	Class II-X:	Student deferment.	Class III-W:	Student deferment.
Class I-Y:	Registrant available for military service.	Class II-Y:	Student deferment.	Class III-X:	Student deferment.
Class I-Z:	Registrant available for military service.	Class II-Z:	Student deferment.	Class III-Y:	Student deferment.

A registrant who was deferred on or before his 26th birthday should ascertain from his local board if his liability has been extended to his 28th or 30th birthday. (See other side.)

First name (Middle initial) (Last name) Selective Service No.


is classified in Class \_\_\_\_\_ until \_\_\_\_\_ by Local Board unless otherwise checked below:  
☐ by Appeal Board  
☐ vote of \_\_\_\_\_ to \_\_\_\_\_  
☐ by President

(Date of mailing)

Member, Executive Secretary, or clerk of  
local board)

(Rochester's signature)

888 Form 110 (Rev. 5-25-87)  
(Previous printings are obsolete)  
(Approval not required)

## NOTICE OF RIGHT TO PERSONAL APPEARANCE AND APPEAL

If this classification is by a local board, you may, within 30 days after the mailing of his/her notice, file a written request for a personal appearance before the local board (unless the classification has been determined upon appeal). Following such an appearance, the local board may classify you as a member of the armed forces, or may refer your case to the next level of appeal. If you do not wish a personal appearance, you may file a written notice of appeal within the applicable period mentioned in the notice of classification. If you do not wish to appeal your case, you may do so by making such an appeal in writing, to your local board, within the specified time.

Appeal from classification by local board may be taken by filing written notice of appeal with your local board within one of the following periods after the date of mailing of the notice:

(1) 30 days if the registrant is located in the United States, its territories, possessions, Canada, Cuba, or Mexico OR:

(7) 60 days if the registrant is located in a foreign country other than Canada, Cuba, or Mexico.

You may file with your local board a written request that the appeal be submitted to the appeal board having jurisdiction over the area in which your principal place of

If an appeal has been taken, and one or more members of the appeal board dissented from such classification, you may file a written notice of appeal to the President with your local board within 30 DAYS after the mailing of this notice.

Your Government Appeal Agent, attached to your selective service local board, is available to advise you regarding your rights and liabilities under the selective service law.

Your Selective Service Number, shown on the reverse side, should appear on all communications with your local board. Sign this form immediately upon receipt.

**FOR INFORMATION AND ADVICE, GO TO ANY LOCAL BOARD**

FOR INFORMATION AND ADVICE, GO TO ANY LOCAL BOARD

DPD: 1968 O - 308-944



SELECTIVE SERVICE SYSTEM  
**ORDER TO REPORT FOR  
ARMED FORCES PHYSICAL EXAMINATION**

Approval Not Required

Inquire at local board as to where you should park your car.

To John H. Sisson Jr.,  
Trepalo Road  
Lincoln, Mass. 01773



Local Board No. 114  
Middlesex County  
34 Commonwealth Ave.  
West Concord, Mass. 01781

(LOCAL BOARD STAMP)

December 19, 1967

(Date of mailing)

SELECTIVE SERVICE NO.

19	114	46	137
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You are hereby directed to present yourself for Armed Forces Physical Examination by reporting at:

Local Board No. 114

Middlesex County

34 Commonwealth Ave.

(Place of reporting) WEST CONCORD, MASS. 01781

on January 12, 1968  
(Date)

at 6:30 A. M.  
(Hour)

regulations do not permit you to drive your car from Concord to Boston.

*August M. Gaudinski*  
(Member or clerk of Local Board)

**IMPORTANT NOTICE**  
(Read Each Paragraph Carefully)

**TO ALL REGISTRANTS:**

When you report pursuant to this order you will be forwarded to an Armed Forces Examining Station where it will be determined whether you are qualified for military service under current standards. Upon completion of your examination, you will be returned to the place of reporting designated above. It is possible that you may be retained at the Examining Station for more than 1 day for the purpose of further testing or for medical consultation. You will be furnished transportation, and meals and lodging when necessary, from the place of reporting designated above to the Examining Station and return. Following your examination your local board will mail you a statement issued by the commanding officer of the station showing whether you are qualified for military service under current standards.

If you are employed, you should inform your employer of this order and that the examination is merely to determine whether you are qualified for military service. To protect your right to return to your job, you must report for work as soon as possible after the completion of your examination. You may jeopardize your reemployment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

**IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU: IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.**

If you are so far from your own Local Board that reporting in compliance with this Order will be a hardship and you desire to report to the Local Board in the area in which you are now located, take this Order and go immediately to that Local Board and make written request for transfer for examination.

**TO CLASS I-A AND I-A-O REGISTRANTS:**


If you fail to report for examination as directed, you may be declared delinquent and ordered to report for induction into the Armed Forces. You will also be subject to fine and imprisonment under the provisions of the Universal Military Training and Service Act, as amended.

**TO CLASS I-O REGISTRANTS:**

This examination is given for the purpose of determining whether you are qualified for military service. If you are found qualified, you will be available, in lieu of induction, to be ordered to perform civilian work contributing to the maintenance of the national health, safety or interest. If you fail to report for or to submit to this examination, you will be subject to be ordered to perform civilian work in the same manner as if you had taken the examination and had been found qualified for military service.

December 26, 1967

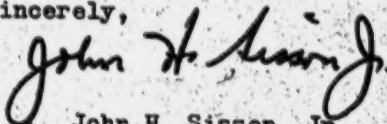
Local Board No. 114  
Middlesex County  
34 Commonwealth Ave.  
West Concord, Mass. 01781



Dear Sirs:

I have received your instructions to report for an Armed Forces Physical Examination on January 12, 1968. Unfortunately, I will be unable to report for the Examination at the specified location and on the specified date because I am leaving today for Montgomery, Alabama where I shall be working as a reporter on the Southern Courier. I am writing you both to notify you of my change of address and occupation and to request a transfer of my Physical Examination to a location in the area of my new address. As I may be assigned to work in Mississippi, I will know my exact address until my arrival in Montgomery on January 1, 1968. I will inform you of my exact address immediately thereafter; until then any correspondence should be directed to me c/o The Southern Courier, 1012 Frank Leu Building, Montgomery, Alabama. Thank you very much for your help.

Sincerely,



John H. Sisson, Jr.  
19 114 46 137

Local Board No. 114  
DEC 28 1967  
West Concord, Mass.



## SELECTIVE SERVICE SYSTEM

Form approved.  
Budget Bureau No. 33-8190-1

## TRANSFER FOR ARMED FORCES PHYSICAL EXAMINATION OR INDUCTION

TO LOCAL BOARD OF TRANSFER

## Part 1.—APPLICATION

Date January 17, 1968I, JOHN E. STISSON, JR.  
(First name) (Middle name) (Last name)

SELECTIVE SERVICE NUMBER			
19	114	45	137

of 502 N. North St. Jackson, Miss. 39201 314 Colorado St. Greenville, S.C.  
(Present address) c/o Nash Bason

present herewith my (Check applicable box)

☒ Order to Report for Armed Forces  
Physical Examination (SSS Form 223)☐ Order to Report for Induction  
(SSS Form 252)issued by Local Board Number 114 West Concord, Mass. 01763  
(City or town, and State)  
directing that I report on Jan. 22, 1968 and hereby request transfer to your local board to report  
(Date)  
on a date to be set by you. The reason I am absent from my own local board area is:  
Residing and employed in this area. Employed by Southern Company.John E. Stisson Jr.  
(Signature of registrant)

## Part 2.—APPROVAL OR DISAPPROVAL

Date Jan. 27, 1968LOCAL BOARD NO. 27  
SELECTIVE SERVICE SYSTEM  
802 NORTH STATE STREET  
JACKSON, MISS. 39201

(Stamp of Local Board of Transfer)

- ☒ Request for transfer is approved. You will be notified by this local board of the date and place to report.
- ☐ Request for transfer is disapproved. You are directed to report as originally ordered by your local board.

Dean R. Webb  
(Signature of local board official)

## Part 3.—TRANSFER ACTION

Date Jan 15, 1968Local Board No. 114  
Middlesex County  
34 Court Street, 1st Fl.  
West Concord, Mass. 01763

(Stamp of Local Board of Origin)

Registrant is transferred. Forms attached.  
Registrant ☐ WAS ☒ WAS NOT previously examined.Status non-inducted  
(Indicate "non-volunteer," "volunteer," "delinquent," "physician," "Class I-O reg." etc.)James M. Gaudin  
(Member or clerk, local board of origin)

## Part 4.—DISPOSITION



Date Feb. 6, 1968On Feb. 1, 1968, the registrant was (Check one)☒ Found qualified; ☐ Found not qualified;☐ Inducted into \_\_\_\_\_  
(Branch of Service)☐ Other (Specify) \_\_\_\_\_

Applicable forms are attached.

James B. Hagan  
(Member or clerk, local board of transfer)LOCAL BOARD NO. 27  
SELECTIVE SERVICE SYSTEM  
802 NORTH STATE STREET  
JACKSON, MISS. 39201

(Stamp of Local Board of Transfer)

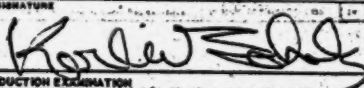
## STATEMENT OF ACCEPTABILITY

LAST NAME - FIRST NAME - MIDDLE NAME SISSON, JOHN HEFFRON JR.		PRESENT HOME ADDRESS 900 N. PARISH ST. JACKSON, MISS.		
SELECTIVE SERVICE NUMBER		LOCAL BOARD ADDRESS		
19	114	46	0137	LE# 27, JACKSON, MISS.
THE QUALIFICATIONS OF THE ABOVE-NAMED REGISTRANT HAVE BEEN CONSIDERED IN ACCORDANCE WITH THE CURRENT REGULATIONS COVERING ACCEPTANCE OF SELECTIVE SERVICE REGISTRANTS AND HE WAS THIS DATE: <b>FEB 9</b> <input checked="" type="checkbox"/> 1. FOUND FULLY ACCEPTABLE FOR INDUCTION INTO THE ARMED FORCES. <input type="checkbox"/> 2. FOUND NOT ACCEPTABLE FOR INDUCTION UNDER CURRENT STANDARDS.				
REMARKS (Place to be directed to Local Board only)				
DATE 1 Feb 68	PLACE AFEEES JACKSON, MISS.	TYPED OR STAMPED NAME AND GRADE OF JOINT EXAMINING AND INDUCTION STATION COMMANDER KARL W. SCHOLZ, CPT., AGC		SIGNATURE 
DD FORM 1 MAR 59 62		PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE.		
		LOCAL BOARD COPY		



W/LB 27

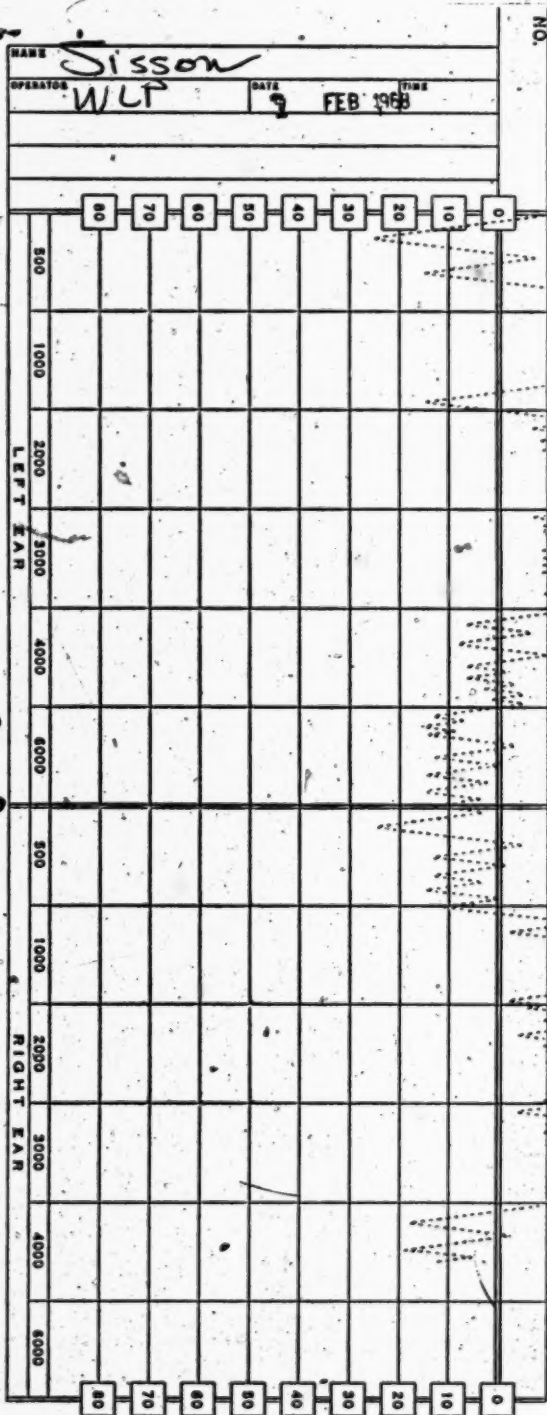
RECORD OF INDUCTION				Form Approved Budget Bureau No. 32-2002-6		DO NOT DEFACE THIS STAMP	
SECTION I - GENERAL (Local Board Will Prepare From Latest Information Available)				1. SERVICE NUMBER (To be entered by Induction Station)		Local Board No. 114 Middlesex County 34 Commonwealth Ave. West Concord, Mass. 01781 <small>(Local Board of Origin Stamp)</small>	
1. LAST NAME - FIRST NAME - MIDDLE NAME  BISSON JR., JOHN HEFFRON							
2. HOME OF RECORD (Number and street or rural route - If none so state - city or post office, county and state) (To be entered by Induction Station)				3. CURRENT ADDRESS  900 N. Parish St., Jackson, Mississippi			
4. SELECTIVE SERVICE NUMBER  19 11 16 137		5. DATE OF BIRTH DAY MONTH YEAR 14 May 46		6. MARITAL STATUS <input checked="" type="checkbox"/> SINGLE <input type="checkbox"/> MARRIED <input type="checkbox"/> DIVORCED <input type="checkbox"/> WIDOWED		7. DEPENDENTS a. NO. CHILDREN UNDER 18 none b. OTHER DEPENDENTS (Specify type of relationship, if married, and address indicated in item 7c) none	
8. PRIOR MILITARY SERVICE <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If "Yes", Complete Items Below)							
9. ARMED FORCE <input type="checkbox"/> ARMY <input type="checkbox"/> NAVY <input type="checkbox"/> AIR FORCE <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> COAST GUARD		10. COMPONENT <input type="checkbox"/> REGULAR <input type="checkbox"/> US <input type="checkbox"/> RES <input type="checkbox"/> NG		11. DATE OF ENL, DIS, APT AND/OR ORDER TO ACTIVE DUTY		12. DATE OF DISCHARGE OR RELEASE	
13. REASON AND AUTHORITY FOR DISCHARGE OR RELEASE (Cite appropriate service regulation)				14. REASON AND AUTHORITY FOR DISCHARGE OR RELEASE (Cite appropriate service regulation)			
15. PRESENT CIVILIAN TRADE OR OCCUPATION (Type of business)				16. LENGTH OF EXPERIENCE YEARS MONTHS 1			
Reporter <span style="float: right;">U.S. (6A)</span>							
17. GRADE OR YEAR COMPLETED <small>(Enter through all grades or years consecutively completed) (Exclude Grade or business school)</small>		18. EDUCATION ELEMENTARY AND HIGH SCHOOL COLLEGE POSTGRADUATE NONE 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100					
19. PLACE OF BIRTH  Boston, Mass.		20. U.S. CITIZEN <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		21. IF NOT A U.S. CITIZEN a. DATE OF ENTRY INTO U.S. FOR <input type="checkbox"/> PERMANENT <input type="checkbox"/> TEMPORARY RESIDENCE		22. ALIEN REGISTRATION RECEIPT CARD NUMBER	
				23. FOREIGN COUNTRY OF WHICH CITIZEN			
24. IF NATURALIZED CITIZEN, GIVE DATE, PLACE, COURT OF JURISDICTION AND NATURALIZATION NUMBER							
25. CONVICTED OR ADJUDICATED OF CRIME OTHER THAN MINOR TRAFFIC VIOLATION (If "Yes", specify crime, date, location of court and continued) <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO							
26. HOW IN CUSTODY OF LAW <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IF ANSWER IS "YES", IN NECESSARY RELEASE OR WAIVER ATTACHED? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO							
27. CONCENTRATION OR DETENTION <input type="checkbox"/> CLAIM 1-6 <input type="checkbox"/> CLAIM 1-9							
28. PREVIOUSLY EXAMINED AND NOT ACCEPTABLE <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If "Yes", indicate the following) (Check one) <input type="checkbox"/> NOT ACCEPTABLE ON PREINDUCTION <input type="checkbox"/> NOT ACCEPTABLE ON INDUCTION <input type="checkbox"/> NOT ACCEPTABLE ON ENLISTMENT							
SECTION II - LOCAL BOARD MEDICAL INTERVIEW							
29. PHYSICAL DEFECTS <small>(To be completed by Local Board)</small>		30. LIST ALL DEFECTS AND DISEASES CLAIMED BY THE REGISTRANT AND ANY DEFECTS OR DISEASES WHICH THE REGISTRANT MAY HAVE, AND WHICH ARE KNOWN TO THE LOCAL BOARD (To be dictated, dictated by "None")  "None"					
		31. ARE ANY OF THE DEFECTS OR DISEASES LISTED IN ITEM 30 ABOVE INCLUDED IN LIST OF DEFECTS (Form 100, Item 1) <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO					
		32. REGISTRANT ON AFFIDAVIT REFERRED TO LOCAL BOARD MEDICAL ADVISOR <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO					
33. STATEMENT OF LOCAL BOARD MEDICAL ADVISOR (To be completed if item 32 is "Yes") PROCESSED: a. <input type="checkbox"/> REGISTRANT DOES NOT HAVE DISQUALIFYING DEFECT(S) CLAIMED b. <input type="checkbox"/> REGISTRANT HAS THE FOLLOWING DISQUALIFYING DEFECT OR DEFECTS (Specify the principal disqualifying defect first, list all other defects in order of significance, and attach affidavits or statements)  c. COMMENTS  DATE PLACE SIGNATURE OF LOCAL BOARD MEDICAL ADVISOR (Form 100, Item 10) SIGNATURE OF MEMBER OR CLERK OF LOCAL BOARD (Form 100, Item 10)  James M. Chudinski Kenneth R. Grudinski, Clerk							

<b>SECTIONS III THROUGH X OF THIS FORM WILL BE FILLED OUT AT INDUCTION STATION</b>																				
<b>SECTION III - MEDICAL DETERMINATION</b>										<b>SECTION IV - ORDER OF RESTRAINTS SERVICE PREFERENCE</b>										
NOTE: Changes in physical profile or physical category on SF 88 will be entered on separate lines under original determination.																				
DATE	PHYSICAL PROFILE SERIAL							PHYSICAL CATEGORY					19. PLACE ORDER OF PREFERENCE NUMBER IN BOX							
	P	U	L	H	E	S	A	B	C	E										
1 Feb 68	1	1	1	1	1	1	X													
<b>SECTION V - MENTAL DETERMINATION</b>																				
AFQT TEST - FORM - SCORE							AFQT MENTAL GROUP		I		II		III		IV		V		ADMINISTRATIVELY ACCEPTED	
AFQT 7C 94									X											
SCORE															<input type="checkbox"/> QUALIFYING <input type="checkbox"/> DISQUALIFYING					
<b>SECTION VI - MORAL DETERMINATION</b>																				
1. RESTRAINT HAS BEEN PERSONALLY INTERVIEWED AT TIME OF: a. <input checked="" type="checkbox"/> PREINDUCTION - REVEALED COURT ADJUDICATION OR CONVICTION <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO    WAIVER: <input checked="" type="checkbox"/> NOT REQUIRED <input type="checkbox"/> GRANTED <input type="checkbox"/> NOT GRANTED <input type="checkbox"/> NOT PROCESSED <input type="checkbox"/> INDUCTION - REVEALED COURT ADJUDICATION OR CONVICTION <input type="checkbox"/> YES <input type="checkbox"/> NO    WAIVER: <input type="checkbox"/> NOT REQUIRED <input type="checkbox"/> GRANTED <input type="checkbox"/> NOT GRANTED <input type="checkbox"/> NOT PROCESSED *Exempt minor traffic violations.    REMARKS:																				
<b>SECTION VII - DETERMINATION AT PREINDUCTION EXAMINATION</b>																				
2. THE QUALIFICATIONS OF THE ABOVE NAMED RESTRAINT HAVE BEEN CONSIDERED IN ACCORDANCE WITH THE CURRENT REGULATIONS GOVERNING THE ACCEPTANCE OF SELECTIVE SERVICE REGISTRANTS AND HE WAS THIS DATE:																				
<input checked="" type="checkbox"/> FOUND ACCEPTABLE FOR INDUCTION INTO THE ARMED FORCES <input type="checkbox"/> FOUND NOT ACCEPTABLE FOR INDUCTION INTO THE ARMED FORCES FOR THE FOLLOWING REASONS: ADMINISTRATIVE: <input type="checkbox"/> MORAL <input type="checkbox"/> ALIEN <input type="checkbox"/> OTHER ADMINISTRATIVE (Specify) <input type="checkbox"/> TRAINABILITY LIMITED (P-Q) <input type="checkbox"/> FAILED AFQT ONLY <input type="checkbox"/> FAILED AFQT AND MEDICAL <input type="checkbox"/> FAILED MEDICAL ONLY: <input type="checkbox"/> PSYCHIATRIC <input type="checkbox"/> OTHER MEDICAL																				
DATE		PLACE		SIGNATURE																
1 Feb 68				AFES, Jackson, Miss.																
TYPED NAME, GRADE, AND ORGANIZATION OF CO OF INDUCTION STATION				SIGNATURE																
KARL W. SCHOLZ, CPT, AGC, AFES																				
<b>SECTION VIII - DETERMINATION AT INDUCTION EXAMINATION</b>																				
3. TYPE OF EXAMINATION (Check one): <input type="checkbox"/> PHYSICAL INSPECTION <input type="checkbox"/> COMPLETE MEDICAL EXAMINATION (Due to lapse of time) <input type="checkbox"/> COMPLETE MEDICAL AND MENTAL EXAMINATION (Examination, psychiatric, personality, etc.) <input checked="" type="checkbox"/> FOUND ACCEPTABLE FOR INDUCTION INTO THE ARMED FORCES <input type="checkbox"/> FOUND NOT ACCEPTABLE FOR INDUCTION INTO THE ARMED FORCES FOR THE FOLLOWING REASONS: ADMINISTRATIVE: <input type="checkbox"/> MORAL <input type="checkbox"/> ALIEN <input type="checkbox"/> OTHER ADMINISTRATIVE (Specify) <input type="checkbox"/> TRAINABILITY LIMITED (P-Q) <input type="checkbox"/> FAILED AFQT ONLY <input type="checkbox"/> FAILED AFQT AND MEDICAL <input type="checkbox"/> FAILED MEDICAL ONLY: <input type="checkbox"/> PSYCHIATRIC <input type="checkbox"/> OTHER MEDICAL																				
DATE		PLACE		SIGNATURE																
TYPED NAME, GRADE AND ORGANIZATION OF CO OF INDUCTION STATION				SIGNATURE																
<b>SECTION IX - DISPOSITION OF INDUCTEE BY ARMED FORCES</b>																				
4. THE QUALIFICATIONS OF THE ABOVE-NAMED INDIVIDUAL HAVE BEEN CONSIDERED IN ACCORDANCE WITH CURRENT REGULATIONS GOVERNING THE ACCEPTANCE OF SELECTIVE SERVICE REGISTRANTS AND HE WAS INDUCTED INTO:													5. DATE OF INDUCTION							
<input checked="" type="checkbox"/> ARMY <input type="checkbox"/> NAVY <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> COAST GUARD <input type="checkbox"/> AIR FORCE																				
6. INDUCTION STATION AT WHICH INDUCTED:																				
7. DATE:																				
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FORM 344

NO.

## MICO AUDIOGRAM

FOR USE WITH  
RUDMOSE AUTOMATIC AUDIOMETER

MINNEAPOLIS

Mico

MINNESOTA



11. OTHER RELATIVES AND ALIEN FRIENDS LIVING IN FOREIGN COUNTRIES (List grandparents, first cousins, aunts, uncles, brothers- and sisters-in-law, and other persons with whom a close relationship existed or exists)

RELATIONSHIP AND NAME	AGE	OCCUPATION	ADDRESS	CITIZENSHIP
NONE				

12. FOREIGN TRAVEL (Other than as a direct result of United States military duties)

DATES	COUNTRY VISITED	PURPOSE OF TRAVEL
FROM— TO—		
July 1946 Sept. 1946	Mexico	Study

13. EMPLOYMENT (Show every employment you have had and all periods of unemployment)

MONTH AND YEAR	NAME AND ADDRESS OF EMPLOYER	NAME OF IMMEDIATE SUPERVISOR	REASON FOR LEAVING
FROM— TO—			
July 1947 Sept. 1947	Peace Corps, Washington, DC	Dave Seaton	fired
Jan. 1948 April 1948	The Southern Courier 11 Commerce St. Montgomery, Alabama	Michael Rothman	induction

14. DID ANY OF THE ABOVE EMPLOYMENTS REQUIRE A SECURITY CLEARANCE? ☐ YES ☒ NO DO YOU HAVE ANY FOREIGN PROPERTY OR BUSINESS CONNECTIONS, OR HAVE YOU EVER BEEN EMPLOYED BY A FOREIGN GOVERNMENT, FIRM, OR AGENCY? ☐ YES ☐ NO HAVE YOU EVER BEEN REFUSED BOND? ☐ YES ☒ NO IF THE ANSWER TO ANY OF THE ABOVE IS "YES," EXPLAIN IN ITEM 20

SOCIAL SECURITY NO.

032-34-8964

15. CREDIT AND CHARACTER REFERENCES (Do not include relatives, former employers, or persons living outside the United States or its Territories.)

NAME (List 3 credit and 5 character)	YEARS KNOWN	STREET AND NUMBER (Business address preferred)	CITY	STATE OR TERRITORY
Cambridge Trust Co.	1		Cambridge	Mass.
Morgan Trust Co.	1		Cambridge	Mass.
World Crop	4		Cambridge	Mass.
P.C. Cushman Quarters	15	Weston Rd. Cambridge	Lincoln	Mass.
Mr. John Page	9	West Neck Rd.	Huntington	N.Y.
Mr. John Wabnick	2	History Dept. Harvard College	Cambridge	Mass.
Miss Ruth Zepmann	2	267 S. Main St.	New Canaan	Conn.
Mr. Frank Bernstein	1	2 Doyle St.	Providence	R.I.





## ARMED FORCES SECURITY QUESTIONNAIRE

## IV.—QUESTIONS

(For each answer checked "Yes" under question 2, set forth a full explanation under "Remarks" below)

		YES	NO			YES	NO
1. I have read the list of names of organizations, groups, and movements set forth under Part II of this form and the explanation which precedes it.		<input checked="" type="checkbox"/>	<input type="checkbox"/>	j. Have you ever contributed money to any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input type="checkbox"/>
2. Concerning the list of organizations, groups and movements set forth under Part II above:		<input checked="" type="checkbox"/>	<input type="checkbox"/>	k. Have you ever contributed services to any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input type="checkbox"/>
a. Are you now a member of any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input type="checkbox"/>	l. Have you ever subscribed to any publication of any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input type="checkbox"/>
b. Have you ever been a member of any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input type="checkbox"/>	m. Have you ever been employed by a foreign government or any agency thereof?		<input type="checkbox"/>	<input type="checkbox"/>
c. Are you now employed by any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input type="checkbox"/>	n. Are you now a member of the Communist Party of any foreign country?		<input type="checkbox"/>	<input type="checkbox"/>
d. Have you ever been employed by any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input type="checkbox"/>	o. Have you ever been a member of the Communist Party of any foreign country?		<input type="checkbox"/>	<input type="checkbox"/>
e. Have you ever attended any meeting of any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input type="checkbox"/>	p. Have you ever been the subject of a loyalty or security hearing?		<input type="checkbox"/>	<input type="checkbox"/>
f. Have you ever attended any social gathering of any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input type="checkbox"/>	q. Are you now or have you ever been a member of any organization, association, movement, group or combination of persons set out on the Attorney General's list which advocates the overthrow of our constitutional form of government, or which has adopted the policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means?		<input type="checkbox"/>	<input type="checkbox"/>
g. Have you ever attended any gathering of any kind sponsored by any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input type="checkbox"/>	r. Have you ever been known by any other last name than that used in signing this questionnaire?		<input type="checkbox"/>	<input type="checkbox"/>
h. Have you prepared material for publication by any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>
i. Have you ever corresponded with any of the organizations, groups, or movements listed or with any publication thereof?		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>

REMARKS

REMARKS (Continued)

## CERTIFICATION

In regard to any part of this questionnaire concerning which I have had any question as to the meaning, I have requested and have obtained a complete explanation. I certify that the statements made by me under Part IV above and on any supplemental pages hereto attached, are full, true, and correct.

FULL NAME OF PERSON MAKING CERTIFICATION John Eaffron Sisson, Jr.	SERVICE NUMBER (if any)	SIGNATURE OF PERSON MAKING CERTIFICATION <i>John Eaffron Sisson Jr.</i>
SIGNED NAME OF WITNESS A. H. GODIN, 1Lt., USMC	DATE 17 Apr 1968	SIGNATURE OF WITNESS <i>A. H. Godin</i>

Standard Form 89  
(REV. MARCH 1965)  
BUREAU OF THE BUDGET  
CIRCULAR A-12

## REPORT OF MEDICAL HISTORY

THIS INFORMATION IS FOR OFFICIAL USE ONLY AND WILL NOT BE RELEASED TO UNAUTHORIZED PERSONS

50-105-01

1. NAME (Last, first, middle initial) <b>SISSON, JOHN HEFFRON JR.</b>		2. GRADE AND COMPONENT OR POSITION		3. IDENTIFICATION NO.	
4. HOME ADDRESS (Number, street or RFD, city or town, zone and State) <b>500 N. PARISH ST. JACKSON, MISS.</b>		5. PURPOSE OF EXAMINATION <b>PRE-INDUCT</b>		6. DATE OF EXAMINATION <b>1 FEB 66</b>	
7. SEX <b>MALE</b>	8. AGE <b>CAU</b>	9. PRIOR MILITARY OR NAVAL SERVICE ARMY <input type="checkbox"/> NAVY <input type="checkbox"/> AIR FORCE <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> CIVILIAN <input type="checkbox"/>	10. AGENCY	11. OCCASION FOR TEST	
12. DATE OF BIRTH <b>14 MAY 46</b>		13. PLACE OF BIRTH <b>DORCHESTER, MASS.</b>		14. NAME, GRADE, AND ADDRESS OF NEXT OF KIN <b>(F) Dr. John H. Sisson Trapez Rd. Lincoln, Massachusetts 01501</b>	
15. EXAMINING PHYSICIAN OR DENTIST, AND ADDRESS <b>DR. JESSE, JACKSON, MISS.</b>		16. OTHER INFORMATION <b>SS019 114 46 0157 W/LS001</b>			
17. SUMMARY OF EXAMINEE'S PRESENT HEALTH IN OWN WORDS (Follow by description of past history, if complaint exists) <b>Good</b>					

18. FAMILY HISTORY			19. ALL LIVING RELATIVES (Parent, brother, sister, sister-in-law, etc.)		
RELATION	AGE	STATE OF HEALTH	IF DEAD, CAUSE OF DEATH	AGE AT DEATH	YES NO (Check each item)
FATHER	50	good			✓ NO TUBERCULOSIS ✓ NO SYPHILIS ✓ NO MALARIA ✓ NO GONORRHEA ✓ NO HEMIPLEGIA ✓ NO EPILEPSY ✓ NO PSYCHOSIS ✓ NO ALZHEIMER ✓ NO PARKINSON ✓ NO OTHER
MOTHER	44	good			✓ NO TUBERCULOSIS ✓ NO SYPHILIS ✓ NO MALARIA ✓ NO GONORRHEA ✓ NO HEMIPLEGIA ✓ NO EPILEPSY ✓ NO PSYCHOSIS ✓ NO ALZHEIMER ✓ NO PARKINSON ✓ NO OTHER
BROTHERS					✓ NO TUBERCULOSIS ✓ NO SYPHILIS ✓ NO MALARIA ✓ NO GONORRHEA ✓ NO HEMIPLEGIA ✓ NO EPILEPSY ✓ NO PSYCHOSIS ✓ NO ALZHEIMER ✓ NO PARKINSON ✓ NO OTHER
SISTER					✓ NO TUBERCULOSIS ✓ NO SYPHILIS ✓ NO MALARIA ✓ NO GONORRHEA ✓ NO HEMIPLEGIA ✓ NO EPILEPSY ✓ NO PSYCHOSIS ✓ NO ALZHEIMER ✓ NO PARKINSON ✓ NO OTHER
GRANDFATHER					✓ NO TUBERCULOSIS ✓ NO SYPHILIS ✓ NO MALARIA ✓ NO GONORRHEA ✓ NO HEMIPLEGIA ✓ NO EPILEPSY ✓ NO PSYCHOSIS ✓ NO ALZHEIMER ✓ NO PARKINSON ✓ NO OTHER
GRANDMOTHER					✓ NO TUBERCULOSIS ✓ NO SYPHILIS ✓ NO MALARIA ✓ NO GONORRHEA ✓ NO HEMIPLEGIA ✓ NO EPILEPSY ✓ NO PSYCHOSIS ✓ NO ALZHEIMER ✓ NO PARKINSON ✓ NO OTHER

20. HAVE YOU EVER HAD OR HAVE YOU NOW (Place check at left of each item)			
YES	NO	(Check each item)	YES NO (Check each item)
✓		SCALDING FEVER, TYPHOID	✓
✓		DYSENTERY	✓
✓		HEMORRHOIDAL PILES	✓
✓		POISON OR PAINFUL BURNS	✓
✓		MEASLES	✓
✓		CHOLERA	✓
✓		SCARLET FEVER	✓
✓		CHICKEN POX	✓
✓		ROSCIOUS OR PAINFUL SPILLS	✓
✓		THE TUBERCLE	✓
✓		EAR, NOSE OR THROAT TROUBLE	✓
✓		POISONING	✓
✓		HEARING LOSS	✓
✓		CHICKEN OR PAINFUL FEELING	✓
✓		SEVERE TOOTH OR GUM TROUBLE	✓
✓		SALTATION	✓
✓		ANY OTHER	✓
✓		INDISTINCT OF HEAD-CHERRY	✓
✓		NO OTHER	✓

21. HAVE YOU EVER (Check each item)		22. FEMALE ONLY: A. HAVE YOU EVER—		B. COMPLETE THE FOLLOWING:	
✓	WOUND GLASSES—CONTACT LENS	✓	NEED PRECANT	AGE AT ONSET OF MENSTRUATION	
✓	WOUND AN ANTERIOR EYE	✓	HAD A PERIOD DISCHARGE	INTERVAL BETWEEN PERIODS	
✓	WOUND HEARING AIDS	✓	HAD TREATED FOR A PERIOD DISCHARGE	DURATION OF PERIODS	
✓	STITCHES OR STAPLES	✓	HAD PAINFUL MENSTRUATION	DATE OF LAST PERIOD	
✓	WOUND A BANG OR BACK TAPPING	✓	HAD MENSTRUATION DISORDER	QUANTITY: <input type="checkbox"/> NORMAL <input type="checkbox"/> EXCESSIVE <input type="checkbox"/> SCANT	
23. HOW MANY DAYS HAVE YOU HAD IN THE PAST THREE YEARS? <b>0</b>		24. WHAT IS THE LONGEST PERIOD YOU HAD IN THE PAST THREE YEARS? <b>0</b>		25. WHAT IS YOUR USUAL OCCUPATION? <b>STUDENT</b>	
				26. ARE YOU (Check one) <input checked="" type="checkbox"/> VERY HEALTHY <input type="checkbox"/> NOT VERY HEALTHY	

YES	NO	QUESTIONS
✓		1. HAVE YOU EVER EXPERIENCED DISCOMFORT OR PAIN WHILE TRYING TO MOVE A JOINT BECAUSE OF: A. SENSITIVITY TO CERTAIN FOODS, DRUGS, MINERALS, ETC. B. CALLOSITY TO PERFORM CERTAIN ACTIVITIES C. INABILITY TO ASSUME CERTAIN POSITIONS D. OTHER MEDICAL REASONS (If yes, give reasons)
✓		2. HAVE YOU EVER WORKED WITH RADIOACTIVE SUBSTANCE
✓		3. DID YOU HAVE DIFFICULTY WITH SCHOOL STUDIES OR TRAINING (If yes, give details)
✓		4. HAVE YOU EVER HAD LIFE ENDANGERED (If yes, state reason and give details)
✓		5. HAVE YOU EVER, OR HAVE YOU BEEN ADVISED TO HAVE, ANY OPERATIONS (If yes, describe and give date at which occurred)
✓		6. HAVE YOU EVER BEEN A PATIENT (committed or voluntary) IN A MENTAL HOSPITAL OR INSTITUTION (If yes, specify when, where, why, and name of doctor, and complete address of hospital or clinic)
		7. HAVE YOU EVER HAD ANY ILLNESS OR INJURY OTHER THAN THOSE SPECIFICALLY NOTED (If yes, specify when, where, and give details)
✓		8. HAVE YOU COMMITTED OR BEEN TREATED BY (OTHER, FOSTERED, MARRIED, OR OTHER PRACTICES) WITHIN THE PAST 5 YEARS (If yes, give complete address of doctor, hospital, clinic, and details)
✓		9. HAVE YOU TREATED YOURSELF FOR ILLNESSES OTHER THAN THOSE SPECIFICALLY NOTED (If yes, specify illness)
✓		10. HAVE YOU EVER BEEN REJECTED FOR MILITARY SERVICE BECAUSE OF PHYSICAL, MENTAL, OR OTHER REASONS (If yes, give date and reason for rejection)
✓		11. HAVE YOU EVER BEEN DISCHARGED FROM EMPLOYMENT BECAUSE OF PHYSICAL, MENTAL, OR OTHER REASONS (If yes, give date, reason, and type of discharge: whether honorable, other than honorable, for unfitness or unsuitability)
✓		12. HAVE YOU EVER RECEIVED, IS THERE PERSON, OR HAVE YOU APPLIED FOR PERSON OR COMPENSATION FOR EMPLOYMENT DISABILITY (If yes, specify what kind, granted by whom, and what amount, when, why)

Removal of thyroglossal duct cyst at age 3

Dr. Carter Redd Rose  
Massachusetts General Hospital  
Boston, Mass.  
(treated me for torn ligaments  
in both knees)

Dr. William McRobbed  
University Health Services  
Cambridge, Mass.  
(treated bimalleolar  
fracture of left ankle)

NOTE: A TRUE OR FALSE ANSWER TO ANY OF THE QUESTIONS ON THIS FORM MAY BE FURNISHED BY FILE OR INTERVIEW (19 U.S.C. 1501)

NOTE: THIS FORM CONTAINS THE FOLLOWING INFORMATION SUPPLIED BY US AND THAT IT IS YOUR DUTY TO COMPLY TO THE BEST OF YOUR KNOWLEDGE.

FOR THE ACT OF THE COURTESY, HOSPITALS, OR CLINICS RECEIVED ABOVE TO FURNISH THE GOVERNMENT A COMPLETE TRANSCRIPT OF AN MEDICAL RECORD FOR PURPOSES OF PROCESSING MY APPLICATION FOR THIS EMPLOYMENT OR SERVICE.

NAME OF PERSON

John Hutton Sisson Jr.

SIGNATURE

John H. Sisson Jr.

EDUCATION, TRAINING AND CLASSIFICATION OF ALL POSITIONS HELD (Physician shall comment on all positive answers in items 20 thru 28)

(20) U.S. Army 5 years  
P.O. 1965 Boston - Legions to begin  
no surgery required  
left medial malleolus fracture in 1966  
thyroglossal duct cyst removed at age 3  
(21) Has worn glasses 2-3 years

NAME OF THE NAME OF PERSON OR ORGANIZATION

K. SCHUSTER OSPAS AND

DATE

FEB 1968

SIGNATURE

McRobbed

NAME OF ATTACHED

FILE



(Rev. June 1956)  
Bureau of the Budget  
Circular A-32 (Rev.)

## REPORT OF MEDICAL EXAMINATION

CS-109-64

1. LAST NAME—FIRST NAME—MIDDLE NAME <b>SISSON, JOHN HEFFRON JR.</b>			2. GRADE AND COMPONENT OR POSITION		3. IDENTIFICATION NO.	
4. HOME ADDRESS (Number, street or R.F.D., city or town, zone and State) <b>908 N. PARISH ST. JACKSON, MISS.</b>			5. PURPOSE OF EXAMINATION <b>PRE-INDUCT</b>		6. DATE OF EXAMINATION <b>1. FEB 1963</b>	
7. SEX <b>MALE</b>	8. RACE <b>CAU</b>	9. TOTAL YEARS GOVERNMENT SERVICE MILITARY _____ CIVILIAN _____		10. AGENCY	11. ORGANIZATION UNIT	
12. DATE OF BIRTH <b>14 MAY 46</b>		13. PLACE OF BIRTH <b>BOSTON, MASS.</b>		14. NAME, RELATIONSHIP, AND ADDRESS OF NEXT OF KIN <b>(F) Dr. John H. Sisson Trapez Rd. Lincoln, Massachusetts 01753</b>		
15. EXAMINING FACILITY OR EXAMINER, AND ADDRESS <b>AFFES, JACKSON, MISS.</b>				16. OTHER INFORMATION <b>SS019 114 46 0137 W/LB627</b>		
17. RATING OR SPECIALTY				TIME IN THIS CAPACITY (Yr/Mo)		LAST SIX MONTHS

CLINICAL EVALUATION		Abnormal
1. Abnormal condition in appropriate organ system (Enter "N/A" if not examined)	Abnormal	Abnormal
10. HEAD, FACE, NECK, AND SCALP		
11. EYES		
12. EARS		
13. MOUTH AND THROAT		
14. LARS—GENERAL (Int. & ext. organs) (Audiology results under items 70 and 71)		
15. LUNGS (Percussion)		
16. EYES—GENERAL (Visual acuity and refraction under items 80, 82 and 83)		
17. OPHTHALMOSCOPIC		
18. PUPILS (Equality and reaction)		
19. OCULAR MOTILITY (Associated parietal movements, nystagmus)		
20. ARMS AND CHEST (Include breasts)		
21. NECK (Throat, size, rhythm, sounds)		
22. VASCULAR SYSTEM (Varicose veins, etc.)		
23. ABDOMEN AND VISCERA (Include breasts)		
24. ANUS AND RECTUM (Hemorrhoids, fistulas) (Proctitis if indicated)		
25. ENDOCRINE SYSTEM		
26. G-U SYSTEM		
27. UPPER EXTREMITIES (Strength, range of motion)		
28. FEET		
29. LOWER EXTREMITIES (Strength, range of motion)		
30. SKIN, OTHER MUSCULOSKELETAL		
31. IDENTIFYING SCOT-MARKS, SCARS, TATTOOS		
32. GUM, LYMPHATICS		
33. NEUROLOGIC (Equilibrium tests under item 70)		
34. PSYCHIATRIC (Specify any personality deviations)		
35. PELVIC (Female only) (Check how done)		
		<input type="checkbox"/> VAGINAL <input type="checkbox"/> RECTAL

NOTES: (Describe every abnormality in detail. Enter pertinent item number before each comment. Continue in item 73 and use additional sheets if necessary.)

37 Old healed leg wound scars 7  
Both knees

(Continue in item 73)

44. DENTAL (Place appropriate symbols above or below number of upper and lower teeth, respectively.)

O—Retainable teeth  
N—Non-retainable teeth

X—Missing teeth  
X.X.X.—Replaced by dentures

(if X.O)—Fixed bridge, brackets to include abutments

REMARKS AND ADDITIONAL DATA  
DEFECTS AND DISEASES

RIGHT	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32
	32	31	30	29	28	27	26	25	24	23	22	21	20	19	18	17	16	15	14	13	12	11	10	9	8	7	6	5	4	3	2	1

**ACCEPTABLE**

45. URINALYSIS A. SPECIFIC GRAVITY

B. ALBUMIN **NEGATIVE**C. SUGAR **NEGATIVE**

D. MICROSCOPIC

46. CHEST X-RAY (Place, date, film number and result)

1 FEB 1963

AFFES, JACKSON, MISS. 46. Hy

47. HEMATOLOGY (Specify test, unit and result)

48. EKG

49. BLOOD TYPE AND RH FACTOR

50. OTHER TESTS

TROR Hy

## MEASUREMENTS AND OTHER FINDINGS

51. HEIGHT <u>70</u>		52. WEIGHT <u>145</u>		53. COLOR HAIR <u>Brown</u>		54. COLOR EYES <u>Blue - 9502</u>		55. BUILD: (Check one)		56. SLENDER <input checked="" type="checkbox"/>		57. MEDIUM		58. HEAVY		59. OBSE		60. TEMPERATURE	
61. BLOOD PRESSURE (Arm at heart level)										62. PULSE (Arm at heart level)									
A. SITTING		B. RECUMBENT		C. STANDING (3 min.)		D. SITTING		E. AFTER EXERCISE		F. 3 MIN. AFTER		G. RECUMBENT		H. AFTER STANDING 3 MIN.					
SYS. <u>120</u>		DAS. <u>70</u>		SYS. <u>120</u>		DAS. <u>70</u>		SYS. <u>120</u>		DAS. <u>70</u>		SYS. <u>120</u>		DAS. <u>70</u>					
63. DISTANT VISION										64. NEAR VISION									
RIGHT (R)		CORR. TO 20		BY <u>1.25 - 0.25</u>		CK <u>105</u>		CORR. TO <u>20</u>		BY <u>20</u>		CORR. TO <u>20</u>		BY <u>20</u>					
LEFT (L)		CORR. TO 20		BY <u>1.00 - 0.75</u>		CK <u>75</u>		CORR. TO <u>20</u>		BY <u>20</u>		CORR. TO <u>20</u>		BY <u>20</u>					
65. METEOROPHORIA (Specify distance)																			
5' "		EX		R. N.		L. N.		PRISM DIV.		PRISM CONV.		PC		PD					
66. ACCOMMODATION										67. COLOR VISION (Test card and recall)									
RIGHT										LEFT									
68. FIELD OF VISION										69. DEPTH PERCEPTION (Test card and score)									
RIGHT										LEFT									
69. HEARING										70. RED LENS TEST									
RIGHT										LEFT									
71. Ruchm										72. PSYCHOLOGICAL AND PSYCHOMOTOR (Tests used and scores)									
RIGHT										LEFT									

73. NOTES (Continued) AND SIGNIFICANT OR INTERVAL HISTORY

AFQT 7C 94 I  
 GT AA

PHYSICAL INSPECTION 17 APR 1968  
 AFEE, BOSTON, MASS. (Date)  
 No Additional Defects discovered  
 (FIT) (UN-1) For Military Service

SIGNATURE

(Use additional sheets if necessary)

74. SUMMARY OF DEFECTS AND DIAGNOSES (List diagnoses with item numbers)

75. RECOMMENDATIONS—FURTHER SPECIALIST EXAMINATIONS INDICATED (Specify)

76. CHARTER (Check)

☒ QUALIFIED FOR  
☐ NOT QUALIFIED FOR

INDUCTION

77. IF NOT QUALIFIED, LIST DISQUALIFYING DEFECTS BY ITEM NUMBER

78. TYPED OR PRINTED NAME OF PHYSICIAN

SIGNATURE

79. TYPED OR PRINTED NAME OF PHYSICIAN

SIGNATURE

80. TYPED OR PRINTED NAME OF DENTIST OR PHYSICIAN (Addressee address)

SIGNATURE

81. TYPED OR PRINTED NAME OF REVIEWING OFFICER OR AUTHORITY

SIGNATURE

NUMBER OF AT-  
TACHED SHEETS

February 29, 1968

Local Board No. 114  
 Middlesex County  
 34 Commonwealth Ave.  
 West Concord, Mass. 01781



Dear Sirs:

I find myself to be conscientiously opposed to service  
 in the Armed Forces. Would you please send me SSS Form No. 150  
 so that I might make my claim as a conscientious objector. Thank  
 you for your cooperation.

Sincerely,

*John H. Sisson, Jr.*  
 John H. Sisson, Jr.

Selective Service No.:  
 19 114 46 137

John H. Sisson, Jr.  
 P.O. Box 457  
 Greenville, Mississippi 38701



Local Board No. 114  
 Middlesex County  
 34 Commonwealth Ave.  
 West Concord, Massachusetts 01781

No. 032478

MAIL

RETURN RECEIPT REQUESTED

Form approved.  
Budget Bureau No. 33-21117.

# SELECTIVE SERVICE SYSTEM

## SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR



DATE QUESTIONNAIRE RECEIVED  
AT LOCAL BOARD

Date of Mailing

COMPLETE AND RETURN BEFORE

1. Name of Registrant (First)	(Middle)	(Last)	2. Selective Service No.
3. Mailing address (Number and street, city, county and State, and Zip Code)			

(The above items, except the date received back at local board, are to be filled in by the local board clerk before the questionnaire is mailed.)

### INSTRUCTIONS

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Classification Questionnaire (SSS Form 100).

The items in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information of only the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the local board shall proceed in the prescribed manner to determine his proper classification. The procedure for appeal from a decision of the local board on a claim of conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector; *Provided*, that the local board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

### Series I.—CLAIM FOR EXEMPTION

**INSTRUCTIONS.**—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

A I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service in the Armed Forces.

(Signature of registrant)

B I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces.

(Signature of registrant)

Under the provisions of section 6 (j) of the Military Selective Service Act of 1947, any person who claims exemption from combatant training and service in the Armed Forces of the United States because he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and such claim is sustained by the local board, shall, if he is inducted into the Armed Forces, be assigned to noncombatant service as defined by the President, or shall, if found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered by his local board, subject to regulations prescribed by the President, to perform for a period of twenty-four consecutive months such civilian work contributing to the maintenance of the national health, safety, or interest as the local board deems appropriate, and any such person who fails or neglects to obey such order of the local board shall be subject to imprisonment for not more than five years or a fine of not more than \$10,000, or to both such fine and imprisonment.

### Series II.—RELIGIOUS TRAINING AND BELIEF

**INSTRUCTIONS.**—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Do you believe in a Supreme Being? ☐ Yes. ☐ No

2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

4. Give the name and present address of the individual upon whom you rely most for religious guidance.

5. Under what circumstances, if any, do you believe in the use of force?

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

### Series III.—GENERAL BACKGROUND

**INSTRUCTIONS.**—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance, and state in each instance the type of school (public, church, military, commercial, etc.).

NAME OF SCHOOL	TYPE OF SCHOOL	LOCATION OF SCHOOL	DATES ATTENDED	
			From—	To—
			19...	19...
			19...	19...
			19...	19...
			19...	19...

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged.

TYPE OF WORK	NAME OF EMPLOYER	ADDRESS OF EMPLOYER	PERIOD WORKED	
			From—	To—
			19...	19...
			19...	19...
			19...	19...
			19...	19...
			19...	19...
			19...	19...



3. Give all addresses and dates of residence where you have formerly lived.

NAME OF CITY, TOWN, OR VILLAGE	STATE OR FOREIGN COUNTRY	STREET ADDRESS OR R. F. D. ROUTE	DATES OF RESIDENCE	
			From—	To—
			19__	19__
			19__	19__
			19__	19__
			19__	19__
			19__	19__
			19__	19__

4. Give the name and address of your parents and indicate whether they are living or not.

5. (a) State the religious denomination or sect of your father.

(b) State the religious denomination or sect of your mother.

#### Series IV.—PARTICIPATION IN ORGANIZATIONS

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

2. Are you a member of a religious sect or organization? ☐ Yes ☐ No. If your reply to item 2 is "yes," complete items (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you.

(b) When, where, and how did you become a member of said sect or organization?

(c) State the name and location of the church, congregation, or meeting where you customarily attend.

(d) Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, social, or labor organizations.

## Series V.—REFERENCES

**INSTRUCTIONS.**—This series must be completed. If more space is needed use extra sheets of paper.

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of professed convictions against participation in war.

NAME	FULL ADDRESS	OCCUPATION OR POSITION	RELATIONSHIP TO REGISTRANT

## REGISTRANT'S CERTIFICATE

**INSTRUCTIONS.**—Every registrant claiming to be a conscientious objector shall make this certificate. If the registrant can read, the items and his replies thereto shall be read to him by the person who assists him in completing this form. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

**NOTICE.**—Imprisonment for not more than five years or a fine of not more than \$10,000, or both such fine and imprisonment is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Military Selective Service Act of 1967.)

I, \_\_\_\_\_, certify that I am the registrant named and described in the foregoing statements in this form; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the

going \_\_\_\_\_ in my own handwriting.

(yes, see next)

Registrant sign here **ES**

(Signature or mark of registrant)

(Signature of witness to mark of registrant)

(Date)

(Date)

(Signature of witness to mark of registrant)

(Date)

If another person has assisted the registrant in completing this form, such person shall sign the following statement:

I have assisted the registrant herein named in completing this form because \_\_\_\_\_

(For example—registrant unable to read and write English, etc.)

(Signature of person who has assisted)

(Occupation of person who has assisted)

(Address of person who has assisted)

(Date)



## SELECTIVE SERVICE SYSTEM

Approval Not Required.

## ORDER TO REPORT FOR INDUCTION



Local Board No. 114  
Middlesex County  
34 Commonwealth Ave.  
West Concord, Mass. 01781

(LOCAL BOARD STAMP)

March 18, 1969

(Date of mailing)

SELECTIVE SERVICE NO.

19 11 16 157

The President of the United States,

To John Heffron Sisson Jr.,  
P. O. Box 457  
Greenville, Mississippi 38701

## GREETING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report at Local Board No. 114, 34 Commonwealth Avenue, West Concord, Mass.

(Place of reporting)

on April 17, 1969

(Date)

at 6:45 A. M.

(Hour)

for forwarding to an Armed Forces Induction Station.

(Member or clerk of Local Board)

## IMPORTANT NOTICE

(Read Each Paragraph Carefully)

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Valid documents are required to substantiate dependency claims in order to receive basic allowances for quarters. Be sure to take the following with you when reporting to the induction station. The documents will be returned to you. (c) FOR LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE—original, certified copy or photostat of a certified copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the signature and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD—certified court order of adoption; (e) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than claimant)—(1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for supporting and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT—affidavits establishing that dependency.

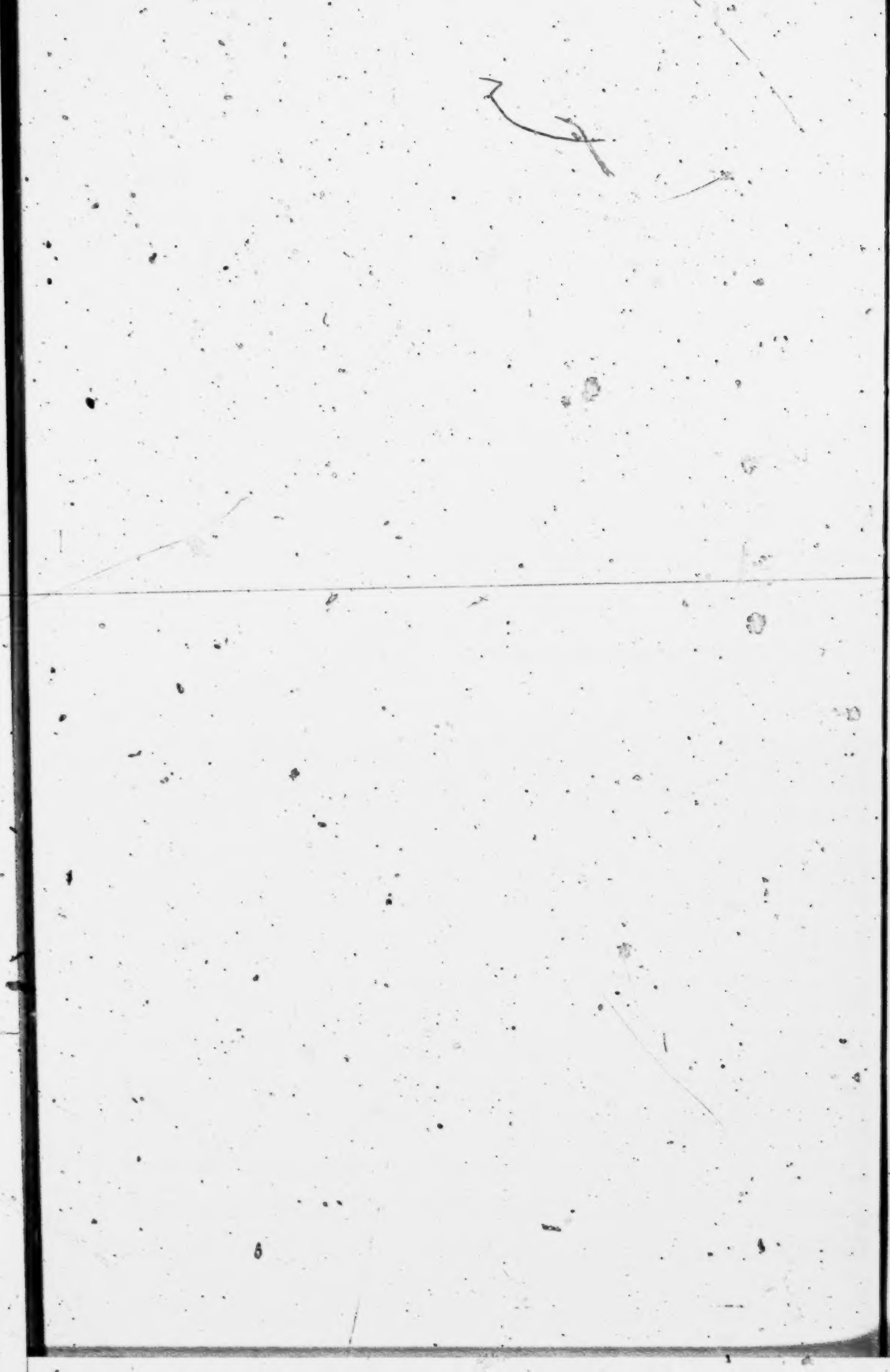
Bring your Social Security Account Number Card. If you do not have one, apply at nearest Social Security Administration Office. If you have life insurance, bring a record of the insurance company's address and your policy number. Bring enough clean clothes for 8 days. Bring enough money to last 1 month for personal purchases.

This Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any undue hardship if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared to continue your employment if you are not inducted. To protect your right to return to your job if you are not inducted, you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your employment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report.

If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, immediately to any local board and make written request for transfer of your delivery for induction, taking this Order with you.



UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

DEFENDANT'S REQUESTS FOR  
JURY INSTRUCTIONS

1. *Reasonable Doubt.*

Reasonable doubt is that kind of doubt which would cause you to hesitate in the important matters of your life before you would take action. *Holland v. United States*, 348 U.S. 121 (1954).

2. *"Willfully".*

a. When used in a criminal statute, the word "willfully" generally means an act done with a bad purpose. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. *Screws v. United States*, 325 U.S. 91, 101 (1945), per Douglas, J.

b. The word "willfully" includes some element of evil motive. *Spies v. United States*, 317 U.S. 492, 498 (1943).

c. The word "willfully" often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute, it generally means an act done with a bad purpose, without justifiable excuse. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act. The defendant's conduct may be unintentional, but you may nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense. *United States v. Murdock*, 290 U.S. 389, 394-95 (1933), per Roberts, J.



d. Doing or omitting to do a thing knowingly and willfully implies not only a knowledge of the thing, but a determination with a bad intent to do it, or to omit doing it. The word "willfully", in the ordinary sense in which it is used in statutes, means not merely "voluntarily" but with a bad purpose. It is frequently understood as signifying an evil intent, without justifiable excuse. *Felton v. United States*, 96 U.S. 675, 702 (1978), per Field, J., quoting from Chief Justice Shaw in *Com. v. Kneeland*, 20 Pick. 220, and from Bishop, Cr. L., Vol. I, sec. 428.

e. The word "willfully" implies a purpose to do wrong. *Potter v. United States*, 155 U.S. 438 (1894).

### 3. *Reasonable Doubt of Willfulness.*

a. If you have a reasonable doubt whether the defendant acted with a bad purpose in refusing to submit to induction into the armed forces, then you must find that the government did not prove the necessary specific intent which is an element of the crime, and you must acquit the defendant.

b. If you have a reasonable doubt whether the defendant acted with evil intent in refusing to submit to induction into the armed forces, then you must find that the government did not prove the necessary specific intent which is an element of the crime, and you must acquit the defendant.

c. If you have a reasonable doubt whether the defendant had the purpose to do wrong in refusing to submit to induction into the armed forces, then you must find that the government did not prove the necessary specific intent which is an element of the crime, and you must acquit the defendant.

### 4. *Specific Intent/Reasonable Belief.*

a. If you find that in refusing to submit to induction into the armed forces, the defendant reasonably believed that the American military involvement in Vietnam was illegal, then you must find that the defendant did not have the necessary specific intent, that he did not act

"willfully" which is an element of the offense under the statute, and you must acquit the defendant.

b. If you find that in refusing to submit to induction into the armed forces, the defendant believed that the American military involvement in Vietnam was illegal, and that a reasonable man could have that belief, then you must find that the defendant did not have the necessary specific intent, that he did not act "willfully" which is an element of the offense under the statute, and you must acquit the defendant.

c. If you find that in refusing to submit to induction into the armed forces, the defendant reasonably believed that the American military involvement in Vietnam was unjustified, then you must find that the defendant did not have the necessary specific intent, that he did not act "willfully" which is an element of the offense under the statute, and you must acquit the defendant.

d. If you find that in refusing to submit to induction into the armed forces, the defendant reasonably believed that the American military involvement in Vietnam was immoral, then you must find that the defendant did not have the necessary specific intent, that he did not act "willfully" which is an element of the offense under the statute, and you must acquit the defendant.

e. If you find that in refusing to submit to induction into the armed forces, the defendant reasonably believed that the American military involvement in Vietnam was illegal or unjustified or immoral, then you must find that the defendant did not have the necessary specific intent, that he did not act "willfully" which is an element of the offense under the statute, and you must acquit the defendant.

f. If you find that in refusing to submit to induction into the armed forces, the defendant followed the dictates of his conscience, then you must find that the defendant did not have the necessary specific intent, that he did not act "willfully" which is an element of the offense under the statute, and you must acquit the defendant.

### 5. *Function of the Jury.*

a. It is the function of the jury to acquit or convict, and the jury need not explain nor answer to anyone, including this Court, for any verdict that it renders.

b. It is the function of the jury to acquit or convict. The jury must render its decision on the basis of two kinds of fact: On the one hand, you must weigh the evidence introduced through witnesses, judging their credibility, as well as through documents. That is one kind or one source of facts. The second kind of fact that you must consider in reaching your verdict is the law, the statute which the defendant is charged with violating, as explained to you by me. In short, you must weigh the evidence and judge whether it meets the requirements of the law. But it is your ultimate (function, duty, power, authority) to acquit or convict, and your verdict need not be explained to anyone, including this Court.

Respectfully submitted,

---

JOHN G. S. FLYM  
Attorney for Defendant

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

vs.

JOHN HEFFRON SISSON, JR.

MOTION IN ARREST OF JUDGMENT

Pursuant to rule 34 of the Federal Rules of Criminal Procedure, the above-mentioned defendant moves for arrest of judgment in his case on the ground that this Court is without jurisdiction of the offense charged.

Defendant is charged with failure to obey an order that he submit to induction into the Armed Forces. That order ultimately rests on a governmental power to conscript which must be found in Article I and Article II of the United States Constitution. However, the constitutional grant of power to the Executive and/or Legislative branches of the Government cannot reasonably be construed to be a grant of such power for all purposes, e.g. for the purpose of waging a genocidal war. Inasmuch as this Court has held that it does not have, or cannot exercise, jurisdiction to adjudicate the legality of the United States military participation in Vietnam, defendant maintains that this Court also lacks jurisdiction under Article III of the United States Constitution to adjudicate his guilt or innocence of the offense charged; alternatively, defendant maintains that this Court cannot adjudicate his guilt or innocence consistent with the requirements of due process of the Fifth Amendment to the United States Constitution. See generally: Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectics", 66 Harv. L.Rev. 1362, 1380, 1382, 1383 (1953); *Estep v. United States*, 327 U.S. 114, 130-132 (1946); *Yakus v. United States*, 321 U.S. 414 (1944).

The objection to having this Court enforce the order referred to above without adjudicating its constitutionality is particularly acute because all of the avenues whereby, analytically, defendant might raise the substance of his defense have been foreclosed: (1) defendant cannot qualify as a "conscientious objector" within the meaning of the Military Selective Service Act of 1967, because he is not a pacifist and, in any event, his convictions that the Vietnam war is illegal, immoral and unjust are not based on "religious training and belief"; (2) he has no judicially recognized right under the First Amendment and/or the Ninth Amendment to act in accordance with the dictates of his conscience—he has neither a statutory nor a constitutional right of "conscience"; (3) despite ample historical evidence to the contrary, the constitutional power of the Executive and Legislative Branches to maintain a standing army (President Eisenhower in his farewell address recommended maintaining a 3.5 million man level) has been upheld, including the power to conscript to maintain a standing army, despite the possibility of obtaining necessary manpower through voluntary enlistment by increasing the wages and salaries of military personnel; in short, defendant is unable to successfully challenge the power of the President and Congress to raise an army, as distinct from their power to use that army to fight the Vietnam war; (4) finally, inasmuch as the Court has held that "specific intent" is not an element of the offence, defendant is precluded from defending himself on the ground that his refusal to submit to induction was founded on the reasonable belief that the war violates domestic law and international law, i.e., the Nuremburg principles, and therefore that he had no bad purpose or evil intent or intent to do wrong in refusing to obey the order that he submit to induction.

Defendant acted on the basis of what was best and highest in him, and it cannot be the function of this Court or the function of the criminal process in a civilized society to punish him for this without affording him any opportunity to establish the substance of his defense. Perhaps the most persuasive evidence that this Court lacks



jurisdiction in the circumstance is that, in order to avoid the manifest injustice of punishing defendant as a felon for doing what he and millions like him believe to be right, this Court would have to permit the trial against him to turn into an empty ritual, a hollow mockery, by permitting or encouraging the jurors to disregard the law.

If the justification or lack thereof of the United States military participation in Vietnam is a question which can only be determined by the President and by Congress, it follows that enforcement of governmental orders pursuant to that determination is also the responsibility of the President and Congress—it is possible for such enforcement to occur without reliance on the criminal process, i.e. by withholding fellowships or similar financial benefits from persons who refuse to abide by that determination, or by raising a volunteer army. Under traditional concepts of separation of power, Congress ought not to be allowed to debase the judicial function by making of the Courts rubber stamps for determinations of "political" questions by the coordinate branches of government.

For these reasons, the Court should grant defendant's motion in arrest of judgment.

Respectfully submitted,

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JOHN G. S. FLYM  
Attorney for Defendant

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

AMENDED MOTION IN ARREST OF JUDGMENT

Pursuant to rule 34 of the Federal Rules of Criminal Procedure, the above-named defendant moves for arrest of judgment in his case on the ground that this Court is without jurisdiction of the offense charged. This "Amended Motion in Arrest of Judgment" is submitted in lieu of the "Motion in Arrest of Judgment" previously submitted by the defendant on March 26, 1969.

Defendant was convicted by a jury on March 21, 1969, of having refused to obey an order that he submit to induction into the Armed Forces. The authority for that order ultimately rests on the power of compulsory conscription which must be found, if at all, in Article I and Article II of the United States Constitution. However, a constitutional grant of such power to the executive and/or legislative branches of the government cannot reasonably be construed to be a grant of such power for all purposes, e.g. for the purpose of waging a genocidal war.

Inasmuch as this Court has held that it does not have, or cannot exercise, jurisdiction to adjudicate the legality of the United States military participation in Vietnam, (see the Court's opinions dated November 25 and November 26, 1968, as well as paragraph 2 and 3 of the Court's Order dated December 3, 1968), defendant maintains that this Court also lacks jurisdiction of the subject matter of the offense with which he is charged. If the political question doctrine is viewed as constitutionally required, then under conventional standards of separation of power this Court lacks jurisdiction under Article

III of the United States Constitution to adjudicate the defendant's guilt or innocence of the offense charged. Alternatively, if the political question doctrine rests on prudential considerations, defendant maintains that this Court cannot adjudicate his guilt or innocence consistent with the requirements of due process of the Fifth Amendment to the United States Constitution. See generally: Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectics", 66 Harv. L. Rev. 1362, 1380, 1382, 1383 (1953); *Estep v. United States*, 327 U.S. 114, 130-132 (1946); *Yakus v. United States*, 321 U.S. 414 (1944).

The objection to having this Court conduct criminal proceedings to "enforce" the order that defendant submit, against his will, to induction into the armed forces without adjudicating the constitutionality of that order is particularly acute because all other avenues whereby, analytically, defendant might raise the substance of his defense have been foreclosed: (1) defendant cannot qualify as a "conscientious objector" within the meaning of the Military Selective Service Act of 1967, because he is not a pacifist and, in any event, his convictions about the illegality, immorality and injustice of the Vietnam war are not based on "religious training and belief" (see paragraph 5 of the Court's Order dated December 3, 1969); (2) defendant claims the right, under the First Amendment and/or the Ninth Amendment, to act in accordance with the dictates of his conscience; this claim of a constitutional right of "conscience" arguably could be translated into a statutory right; however, even if it were desirable to expand, with respect to "religious" objectors, the scope of section 6(j) of the Military Selective Service Act of 1967 by judicial construction to include so-called "selective" conscientious objectors (in order to avoid distinctions which may violate the First Amendment to the United States Constitution), the process of identifying such conscientious objectors would require adjudication of the very issues which this Court has already declared to be political questions, and therefore questions over which it has no jurisdiction—see e.g. 54 Va. L. Rev. 1355, 1374, 1375. (1968); (3) despite ample his-

torical evidence to the contrary, the constitutional power of the executive and legislative branches to conscript for the purpose of maintaining a standing army (President Eisenhower in his farewell address recommended maintenance of a 3.5 million man level) has been upheld, despite the possibility of obtaining necessary manpower through voluntary enlistment by increasing the wages and salaries of military personnel; in short, defendant is unable to successfully challenge the power of the President and Congress to raise an army, as distinct from their power to use that army to fight the Vietnam war; (4) finally, the Court has also held that "specific intent" is not an element of the offense, and defendant is therefore unable to defend himself on the ground that his refusal to submit to induction was founded on the reasonable belief that the war violates domestic law and/or international law, e.g., the Nuremberg principles, and therefore that he had no bad purpose or evil intent or intent to do wrong in refusing to obey the order that he submit to induction.

Defendant acted on the basis of what was best and highest in him, and it cannot be the function of this Court or the function of the criminal process is a civilized, democratic society to punish him for doing so without affording him any opportunity to establish the substance of his defense. Perhaps the most persuasive evidence that this Court lacks jurisdiction, in the circumstances, is that in order to avoid the manifest injustice of punishing defendant as a felon for doing what he and millions like him believe to be right, this Court would have to permit the trial against him to turn into an empty ritual by permitting or encouraging the jurors to disregard the law.

If the justification or lack thereof of the United States military participation in Vietnam is a question which can only be determined by the President and by Congress, it follows that enforcement of governmental orders pursuant to that determination is also the responsibility of the President and Congress—it may be possible for such enforcement to occur without reliance on the criminal process, e.g. by withholding fellowships or similar finan-

cial benefits from persons who refuse to abide by such a determination, or by raising a volunteer army. Congress ought not to be allowed to debase the judicial function by making of the Courts rubber stamps for the determinations of "political" questions made by the coordinate branches of government.

For these reasons, the Court should grant defendant's motion in arrest of judgment.

Respectfully submitted,

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JOHN G. S. FLYM  
Attorney for Defendant



UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

OPINION

April 1, 1969

WYZANSKI, Chief Judge

A. *Introduction*

March 21, 1969, in the United States District Court sitting in Boston, a jury returned a verdict that John Heffron Sisson, Jr. was guilty of unlawfully, knowingly, and wilfully having refused to comply with the order of Local Board No. 114 to submit to induction into the armed forces of the United States, in violation of the Military Selective Service Act of 1967. Title 50, Appendix, United States Code, Section 462. 32 Code of Federal Regulations 1632.14.

Pursuant to Rule 34 of the Rules of Criminal Procedure, Sisson on March 28, 1969, filed an amended motion in arrest of judgment. Adequate reference is made to earlier contentions. A new point is also raised: that the judicial power vested in this court by Article III of the United States Constitution does not give jurisdiction to adjudicate the merits of a criminal case in which the court is precluded, by the doctrine of so-called "political questions" or otherwise, from deciding relevant constitutional, domestic, and international law questions raised by defendant. It is said that a trial designed to exclude relevant issues violates the "due process" clause of the Fifth Amendment.

Important as is the new issue, defendant indicated both before and during the trial that he also intended to pre-

serve his older contention that no offense is charged in the indictment because it is laid under a statute, which, as applied to him, violates the provision of the First Amendment that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" and the "due process" clause of the Fifth Amendment.

It would have been better practice to make in the motion in arrest of judgment a more detailed reference to, and repetition of, that earlier contention. But, of course, at every stage the court is required to bear in mind constitutional and jurisdictional issues which have been raised and remain of vital consequence. Furthermore, this court on March 26 provided that until April 3 defendant could file a motion in arrest. No doubt, defendant will seasonably make his motion in arrest even clearer.

This court in this opinion addresses itself not to the new point but to a further consideration of the never-abandoned issue whether the government can constitutionally require combat service in Vietnam of a person who is conscientiously opposed to American military activities in Vietnam because he believes them immoral and unjust, that belief resting not upon formal religion but upon the deepest convictions and ethical commitments, apart from formal religion, of which a man is capable.

While Sisson has raised and not abandoned other issues, most of them have already been disposed of by earlier rulings in this case, *United States v. Sisson*, 294 F. Supp. 511, 515, 520 (D. Mass., 1968). Out of an abundance of caution this court repeats the following rulings already made, of which the first is peculiarly pertinent.

November 25, 1968 this court's opinion held that *under present circumstances*, described in that opinion, *Sisson has the necessary standing to raise the issues he tenders*. See 294 F. Supp. 511, 512-513.

The same opinion held that this court has no jurisdiction to decide the "political question" whether the military actions of the United States in Vietnam require as a constitutional basis a declaration of war by Congress.

November 26, 1968 in a second opinion this court held it has no jurisdiction to decide the "political question"

whether American military operations in Vietnam violate international law. The holding is expanded and clarified in this court's order of December 3, 1968.

That order also ruled that if the Government should prove defendant intentionally refused to comply with a duly authorized order of his draft board to submit to induction then under the act it would not be open to defendant to offer as a statutory excuse that he regarded the war as illegal, immoral, or unjust.

### B. *The Facts*

From the transcript of the jury trial and the exhibits then admitted, the facts appear virtually without dispute. Indeed in substance the case arises upon an agreed statement of facts.

The usual preliminaries having been completed, Local Board No. 114, Middlesex County, Massachusetts, on Form 252, executed and mailed to Sisson March 18, 1968 an order to report for induction on April 17, 1968. Sisson received the order. On the scheduled day he reported to the local board and from there went to the Boston induction center, as required. At the Boston center, Sisson, after the officer in charge had painstakingly warned him of the consequences, deliberately refused to take the step forward which is, as he understood, the symbolic act of accepting induction.

The evidence shows that the proceedings were in every respect regular. Sisson has never made complaint that there was any error with respect to his registration, the chronological order in which he was called, his physical, mental, and moral examinations, or any other procedural step.

Sisson does not now and never did claim that he is or was in the narrow statutory sense a religious conscientious objector.

Sisson graduated in 1963 from the Phillips Exeter Academy and in 1967 from Harvard College. He enlisted in the Peace Corps in July 1967, but after training he was, for reasons that have no moral connotations, "deselected" in September 1967. In January 1968 he went

to work as a reporter for *The Southern Courier*, published in Montgomery, Alabama. That paper assigned him to work in Mississippi, where he was when he received the induction order.

The first formal indication in the record that Sisson had conscientious scruples is a letter of February 29, 1968 in which he notified Local Board No. 114 that "I find myself to be conscientiously opposed to service in the Armed Forces. Would you please send me SSS Form No. 150 so that I might make my claim as a conscientious objector." On receiving the form, Sisson concluded that his objection not being religious, within the administrative and statutory definitions incorporated in that form, he was not entitled to have the benefit of the form. He, therefore, did not execute it.

But, although the record shows no earlier formal indication of conscientious objection, Sisson's attitude as a non-religious conscientious objector has had a long history. Sisson himself referred to his moral development, his educational training, his extensive reading of reports about and comments on the Vietnam situation, and the degree to which he had familiarized himself with the U.N. Charter, the charter and judgments of the Nuremberg Tribunal, and other domestic and international matters bearing upon the American involvement in Vietnam.

On the stand Sisson was diffident, perhaps beyond the requirements of modesty. But he revealed sensitiveness, not arrogance or obstinacy. His answers lacked the sharpness that sometimes reflects a prepared mind. He was entirely without eloquence. No line he spoke remains etched in memory. But he fearlessly used his own words, not mouthing formulae from court cases or manuals for draft avoidance.

There is not the slightest basis for impugning Sisson's courage. His attempt to serve in the Peace Corps, and the assignment he took on a Southern newspaper were not acts of cowardice or evasion. Those actions were assumptions of social obligations. They were in the pattern of many conscientious young men who have recently come of age. From his education Sisson knows that his claim of conscientious objection may cost him dearly. Some

will misunderstand his motives. Some will be reluctant to employ him.

Nor was Sisson motivated by purely political considerations. Of course if "political" means that the area of decision involves a judgment as to the conduct of a state, then any decision as to any war is not without some political aspects. But Sisson's table of ultimate values is moral and ethical. It reflects quite as real, pervasive, durable, and commendable a marshalling of priorities as a formal religion. It is just as much a residue of culture, early training, and beliefs shared by companions and family. What another derives from the discipline of a church, Sisson derives from the discipline of conscience.

Thus, Sisson bore the burden of proving by objective evidence that he was sincere. He was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion.

Sisson's views are not only sincere, but, without necessarily being right, are reasonable. Similar views are held by reasonable men who are qualified experts. The testimony of Professor Richard Falk of Princeton University and Professor Howard Zinn of Boston University is sufficient proof. See also Ralph B. Potter, *New Problems for Conscience in War*, American Society for Christian Ethics, January 19, 1968; *War and Moral Discourse*, John Knox Press, 1969.

### C. *Limitation of Issues*

The facts found by the jury and recited above raise many points of law, some presented early in this case, others raised explicitly or inferentially in the amended motion filed in arrest of judgment.

If any one of those points is incontrovertibly sound, the court should so state and probably not give rulings on others. Such additional rulings would be gratuitous and violative of the canon of avoidance of unnecessary constitutional adjudications. Hence if this court were a court of last resort, this court would adopt the prudential principle of striking for the jugular alone.



But this inferior court cannot say that any of the issues is clear. It cannot by ruling on one surely make the others moot. This court's ruling is appealable. Hence any constitutional issue whatsoever which defendant here alleged as a ground for having judgment arrested remains open in an appellate court.

More significantly, at least all those issues which are raised under the First Amendment are so interlocked textually and substantively, that one of those issues cannot properly be considered apart from the others. Sound interpretation of any phrase of the Amendment requires reconciliation both with every other phrase of that Amendment and with the Constitution as a whole.

Therefore, it is meet for this opinion to consider both the broad contention, growing principally out of "the free exercise of" religion phrase, that no statute can require combat service of a conscientious objector whose principles are either religious or akin thereto, and the narrower contention growing principally out of "the establishment" of religion phrase, that the 1967 draft act invalidly discriminates in favor of certain types of religious objectors to the prejudice of Sisson. An appellate court might find it suitable to render its judgment solely on the latter issue. This inferior court, as already explained, is not so conveniently situated. In candor it must be added that this court found it understanding of the narrow issue much clarified by first analyzing, as will be seen, the broad issue.

While this court believes it cannot escape a full survey of the First Amendment issues, the court does not now deem it necessary to address itself to the new contentions in the amended motion, filed March 28 in arrest of judgment. Those contentions as to the judicial power of the United States Courts are of the most serious nature. If defendant's other grounds for his amended motion in arrest of judgment do not prevail in the Supreme Court, that court no doubt will have to rule upon the new contentions with respect to judicial power, or to remand the case to this court for a ruling. But that bridge need not be crossed if this opinion has effectively found another way of crossing the stream.

#### D. *Exhaustion of Administrative Remedies*

The First Amendment issues are open to Sisson in this and other courts even though Sisson did not raise them before the draft board or in any other step in the administrative process. What Sisson is here doing is challenging the constitutionality of the 1967 Act as applied to him. There was no realistic opportunity to make such a challenge until now. Whatever may be academic theory, no administrative agency, such as a draft board, believes it has power or, practically, would exercise power, to declare unconstitutional the statute under which it operates. Maybe a day will come when an administrative agency's right and duty not to apply an unconstitutional statutory provision are generally acknowledged, practiced and approved. Under present practice the first time a contention of unconstitutionality of a statutory provision may effectively be made is in a court.

Sisson waited until the administrative process was over because he had no choice. Cf. *Clark v. Gabriel*, 393 U.S. 256, 259 (1968).

This court waited until the jury had given a guilty verdict because only then did the judge have no choice.

In Sisson's case the judges have become the first and the last before whom the constitutional issues can be effectively raised as a matter of law.

#### E. *The Constitutional Power of Congress to Draft Conscientious Objectors for Combat Duty in a Distant Conflict Not Pursuant to a Declared War*

Indubitably Congress has constitutional power to conscript the generality of persons for military service in time of war. *Selective Draft Law Cases*, 245 U.S. 366 (1918). That is, there is not a constitutional gap, nor a defect of power to conscript in time of war, any more than there is a defect of power to raise an army of volunteers. Daniel Webster's contrary views have been superseded. See *Holmes v. U.S.*, 391 U.S. 936, 940 note (1968). His historical reading of the past was better than of the future.

Whether this constitutional power exists in time of peace has been thought by some justices of the Supreme Court to be an open question. See *Holmes v. U.S.*, 391 U.S. 936, 938-949 (1968); *Hart v. U.S.*, 391 U.S. 956 (1968); *McArthur v. Clifford*, 393 U.S. 1002 (1968). However, this court, until otherwise authoritatively instructed, assumes that Congressional power to conscript for war embraces Congressional power in time of peace to conscript for later possible war service. But the assumption is not fully supported despite what this court indicated in 294 F. Supp. at p. 513, by *Hamilton v. University of California*, 293 U.S. 245 (1934). *Hamilton* goes on the narrow ground that the Fourteenth Amendment does not confer "the right to be students in the state university free from the obligation to take military training as one of the conditions of attendance," Thomas Reed Powell, *Conscience and the Constitution* in William T. Hutchinson, Editor, *Democracy and National Unity*, The University of Chicago Press, 1941, p. 15 of the reprint. The opinion of Justice Butler, it is true, proceeded on the premise that the conscription power was the same in peace as in war. But, Justice Cardozo, speaking for himself, Justice Brandeis, and Justice Stone, observed that "There is no occasion at this time to mark the limits of governmental power in the exaction of military service when the nation is at peace." (p. 265).

This court's assumption that Congress has the general power to conscript in time of peace is not dispositive of the specific question whether that general power is subject to some exception or immunity available to a draftee because of a constitutional restriction in favor of individual liberty. See Powell, above, at pp. 6, 18.

However, some have supposed the specific question is foreclosed. At the head of the procession is Judge Learned Hand who a decade ago, before the Vietnam conflict sharpened our focus, announced in the Oliver Wendell Holmes Lectures on *The Bill of Rights*, Harvard University Press, (1958), p. 64, (same book republished with same pagination, Athenæum Press, 1964), without pausing for a footnote, that "We could, though we do not, lawfully require all citizens to do military service regardless of their religious principles."

No doubt Judge Learned Hand recalled the argument Mr. John W. Davis made in *Macintosh v. U.S.*, 283 U.S. 605 (1931), that it is a "fixed principle of our Constitution . . . that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so." (p. 623) Judge Hand remembered that the argument of Mr. Davis had been rejected by Justice Sutherland, 283 U.S. at pages 623-624, in language quoted by Justice Butler at p. 264 in *Hamilton*:

"The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him . . . [T]he war powers . . . include . . . the power, *in the last extremity*, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general." (Emphasis added).

Sweeping as the foregoing quotation seems to be, there are restrictive implications inherent in the use of the phrase "in the last extremity." And while Justice Sutherland does use the comprehensive words "to compel the armed service of any citizen", it is arguable that he was not seeking prematurely to answer a question which a few years later Thomas Reed Powell treated as still undecided, that is "whether a conscientious objector could constitutionally be required to kill." Powell at p. 17.

The sum of the matter is that a careful scholar would conclude in 1969, as Professor Powell did in 1941, that "Notwithstanding all judicial declarations, it has not been actually decided that a conscientious objector, not within any group exempted by Congress, can be put into the front-line trenches or put into the army where certain refusals to obey orders may be punished by death." See Powell, above, at p. 18.

Yet, open as the issue may be, *this Court in the following discussion assumes that a conscientious objector, religious or otherwise, may be conscripted for some kinds*



of service in peace or in war. This court further assumes that in time of declared war or in the defense of the homeland against invasion, all persons may be conscripted even for combat service.

But the precise inquiry this court cannot avoid is whether now Sisson may be compelled to submit to non-justiciable military orders which may require him to render combat service in Vietnam. Cf. *In re Jenison*, 375 U.S. 14 (1963); same case on remand 267 Minn. 136, 125 N.W. (2d) 588 (1964).

Implicit is the problem whether in deciding the issue as to the constitutional claim of a conscientious objector to be exempt from combat service, circumstances alter cases. (See the admittedly distinguishable case of jury duty, *In Re Jenison* above.)

This is not an area of constitutional absolutism. It is an area in which competing claims must be explored, examined, and marshalled with reference to the Constitution as a whole.

There are two main categories of conflicting claims. First, there are both public and private interests in the common defense. Second there are both public and private interests in individual liberty.

Every man, not least the conscientious objector, has an interest in the security of the nation. Dissent is possible only in a society strong enough to repel attack. The conscientious will to resist springs from moral principles. It is likely to seek a new order in the same society, not anarchy or submission to a hostile power. Thus conscience rarely wholly disassociates itself from the defense of the ordered society within which it functions and which it seeks to reform not to reduce to rubble.

In parallel fashion, every man shares and society as a whole shares an interest in the liberty of the conscientious objector, religious or not. The freedom of all depends on the freedom of each. Free men exist only in free societies. Society's own stability and growth, its physical and spiritual prosperity are responsive to the liberties of its citizens, to their deepest insights, to their free choices, "That which opposes also fits".



Those rival categories of claims cannot be mathematically graded. There is no table of weights and measures. Yet there is no insuperable difficulty in distinguishing orders of magnitude.

The sincerely conscientious man, whose principles flow from reflection, education, practice, sensitivity to competing claims, and a search for a meaningful life, always brings impressive credentials. When he honestly believes that he will act wrongly if he kills, his claim obviously has great magnitude. That magnitude is not appreciably lessened if his belief relates not to war in general, but to a particular war or to a particular type of war. Indeed a selective conscientious objector might reflect a more discriminating study of the problem, a more sensitive conscience, and a deeper spiritual understanding.

It is equally plain that when a nation is fighting for its very existence there are public and private interests of great magnitude in conscripting for the common defense all available resources, including manpower for combat.

But a campaign fought with limited forces for limited objects with no likelihood of a battlefront within this country and without a declaration of war is not a claim of comparable magnitude.

Nor is there any suggestion that in present circumstances there is a national need for combat service from Sisson as distinguished from other forms of service by him. The want of magnitude in the national demand for combat service is reflected in the nation's lack of calls for sacrifice in any serious way by civilians.

Before adding up the accounts and striking a balance there are other items deserving notice.

Sisson is not in a formal sense a religious conscientious objector. His claim may seem less weighty than that of one who embraces a creed which recognizes a Supreme Being, and which has as part of its training and discipline opposition to war in any form. It may even seem that the Constitution itself marks a difference because in the First Amendment reference is made to the "free exercise of" "religion", not to the free exercise of conscience. Moreover, Sisson does not meet the 1967 con-

gressional definition of religion. Nor does he meet the dictionary definition of religion.

But that is not the end of the matter. The opinions in *U.S. v. Seeger*, 380 U.S. 163 (1965) disclosed wide vistas. The court purported to look only at a particular statute. It piously disclaimed any intent to interpret the Constitution or to examine the limitations which the First and Fifth Amendment place upon Congress. But commentators have not forgotten the Latin tag *pari passu*. See Note *The Conscientious Objector and The First Amendment: There but for the Grace of God*, 34 U. Chi. L. Rev. 79 (1966); James B. White, *Processing Conscientious Objector Claims: A Constitutional Inquiry*, 56 Cal. L. Rev. 652 (1968); Hugh C. Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 Va. L. Rev. 1355 (1968); John Mansfield, *Conscientious Objection—1964 Term*, 1965 Religion and the Public Order 1.

The rationale by which Seeger and his companions on appeal were exempted from combat service under the statute is quite sufficient for Sisson to lay valid claim to be constitutionally exempted from combat service in the Vietnam type of situation.

Duty once commonly appeared as the "stern daughter of the voice of God." Today to many she appears as the stern daughter of the voice of conscience. It is not the ancestry but the authenticity of the sense of duty which creates constitutional legitimacy.

Some suppose that the only reliable conscience is one responsive to a formal religious community of memory and hope. But in *Religion In The Making*, Alfred North Whitehead taught us that "religion is what the individual does with his own solitariness." pp. 16, 47, 58.

Others fear that recognition of individual to perpetrate a fraud. His own word will so often enable him to sustain his burden of proof. Cross-examination will not easily discover his insincerity.

*Seeger* cut the ground from under that argument. So does experience. Often it is harder to detect a fraudulent adherent to a religious creed than to recognize a sincere moral protestant. See Justice Jackson's dissent

in *U.S. v. Ballard*, 322 U.S. 78, 92-95 (1944). We all can discern Thoreau's integrity more quickly than we might detect some churchman's hypocrisy.

The suggestion that courts cannot tell a sincere from an insincere conscientious objector underestimates what the judicial process performs every day. Ever since, in *Edginton v. Fitzmaurice* (1882) L.R. 29 Ch. Div. 359, Bowen L.J. quipped that "the state of a man's mind is as much a fact as the state of his digestion", each day courts have applied laws, criminal and civil, which make sincerity the test of liability.

There have been suggestions that to read the Constitution as granting an exemption from combat duty in a foreign campaign will immunize from public regulation all acts or refusals to act dictated by religious or conscientious scruple. Such suggestions fail to note that there is no need to treat, and this court does not treat, religious liberty as an absolute. The most sincere religious or conscientious believer may be validly punished even if in strict pursuance of his creed or principles, he fanatically assassinates an opponent, or practices polygamy, *Reynolds v. U.S.*, 98 U.S. 154 (1878), or employs child labor, *Prince v. Massachusetts*, 321 U.S. 158 (1944). Religious liberty and liberty of conscience have limits in the face of social demands of a community of fellow citizens. There are, for example, important rival claims of safety, order, health, and decency.

Nor is it true that to recognize liberty of conscience and religious liberty will set up some magic line between nonfeasance and misfeasance. A religiously motivated failure to discharge a public obligation may be as serious a crime as a religiously motivated action in violation of law. We may, argumentatively, assume that one who out of religious or conscientious scruple refuses to pay a general income or property tax, assessed without reference to any particular kind of contemplated expenditure, is civilly and criminally liable, regardless of his sincere belief that he is responding to a divine command not to support the government.

Most important, it does not follow from a judicial decision that Sisson cannot be conscripted to kill in Vietnam

that he cannot be conscripted for non-combat service there or elsewhere.

It would be a poor court indeed that could not discern the small constitutional magnitude of the interest that a person has in avoiding all helpful service whatsoever or in avoiding paying all general taxes whatsoever. His objections, of course, may be sincere. But some sincere objections have greater constitutional magnitude than others.

There are many tasks, technologically or economically related to the prosecution of a war, to which a religious or conscientious objector might be constitutionally assigned. As Justice Cardozo wrote "Never in our history has the notion been accepted, or even, it is believed, advanced, that acts thus indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state." *Hamilton v. University of California*, 293 U.S. 245, 267 (1934).

Sisson's case being limited to a claim of conscientious objection to combat service in a foreign campaign, this court holds that the free exercise of religion clause in the First Amendment and the due process clause of the Fifth Amendment prohibit the application of the 1967 draft act to Sisson to require him to render combat service in Vietnam.

The chief reason for reaching this conclusion after examining the competing interests is the magnitude of Sisson's interest in not killing in the Vietnam conflict as against the want of magnitude in the country's present need for him to be so employed.

The statute as here applied creates a clash between law and morality for which no exigency exists, and before, in Justice Sutherland's words, "the last extremity" or anything close to that dire predicament has been glimpsed, or even predicted, or reasonably feared.

When the state through its laws seeks to override reasonable moral commitments it makes a dangerously uncharacteristic choice. The law grows from the deposits of morality. Law and morality are, in turn, debtors and creditors of each other. The law cannot be adequately



enforced by the courts alone, or by courts supported merely by the police and the military. The true secret of legal might lies in the habits of conscientious men disciplining themselves to obey the law they respect without the necessity of judicial and administrative orders. When the law treats a reasonable, conscientious act as a crime it subverts its own power. It invites civil disobedience. It impairs the very habits which nourish and preserve the law.

F. *The Constitutional Power of Congress to Discriminate as It Did in the 1967 Draft Act Between the Draft Status of Sisson as a Conscientious Objector and the Draft Status of Adherents to Certain Types of Religions.*

The Supreme Court may not address itself to the broad issue just decided. Being a court of last resort, it, unlike an inferior court, can confidently rest its judgment upon a narrow issue. Indeed *Seeger* foreshadows exactly that process. So it is incumbent on this court to consider the narrow issue, whether the 1967 Act invalidly discriminates against Sisson as a non-religious conscientious objector.

The draft act now limits "exemption from combat training and service" to one "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form" 50 U.S.C. App. Section 456 (j), commonly cited as Section 6(j) of the Act as amended.

A Quaker, for example, is covered if he claims belief in the ultimate implications of William Penn's teaching.

Persons trained in and believing in other religious ways may or may not be covered. A Roman Catholic obedient to the teaching of Thomas Aquinas and Pope John XXIII might distinguish between a just war in which he would fight and an unjust war in which he would not fight. Those who administer the Selective Service System opine that Congress has not allowed exemption to those whose conscientious objection rests on such a distinction. See Lt. Gen. Lewis B. Hershey, *Legal As-*



*pects of Selective Service*, U.S. Gov. Printing Office, January 1, 1969, pp. 13-14. This court has a more open mind.

However, the administrators and this court both agree that Congress has not provided a conscientious objector status for a person whose claim is admittedly not formally religious.

In this situation Sisson claims that even if the Constitution might not otherwise preclude Congress from drafting him for combat service in Vietnam, the Constitution does preclude Congress from drafting him under the 1967 Act. The reason is that this Act grants conscientious objector status solely to religious conscientious objectors but not to non-religious objectors.

Earlier this opinion noted that it is practical to accord the same status to non-religious conscientious objectors as to religious objectors. Moreover, it is difficult to imagine any ground for a statutory distinction except religious prejudice. In short, in the draft act Congress unconstitutionally discriminated against atheists, agnostics, and men, like Sisson, who, whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings.

This court, therefore, concludes that in granting to the religious conscientious objector but not to Sisson a special conscientious objector status, the Act, as applied to Sisson, violates the provision of the First Amendment that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." *Torcaso v. Watkins*, 367 U.S. 488 (1961) Cf. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

In the words of Rule 34, the indictment of Sisson "does not charge an offense".

This court's "decision arresting a judgment of conviction for insufficiency of the indictment . . . is based upon the invalidity . . . of the statute upon which the indictment is founded" within the meaning of those phrases as used in 18 U.S.C. Section 3731. *U.S. v. Green*, 350 U.S. 415, 416 (1956); *U.S. v. Bramblett*, 348 U.S. 503, 504 (1955). Therefore, "an appeal may be taken by and

on behalf of the United States . . . direct to the Supreme Court of the United States."

TO GUARD AGAINST MISUNDERSTANDING, THIS COURT HAS NOT RULED THAT:

- (1) THE GOVERNMENT HAS NO RIGHT TO CONDUCT VIETNAM OPERATIONS; OR
- (2) THE GOVERNMENT IS USING UNLAWFUL METHODS IN VIETNAM; OR
- (3) THE GOVERNMENT HAS NO POWER TO CONSCRIPT THE GENERALITY OF MEN FOR COMBAT SERVICE; OR
- (4) THE GOVERNMENT IN A DEFENSE OF THE HOMELAND HAS NO POWER TO CONSCRIPT FOR COMBAT SERVICE ANYONE IT SEES FIT; OR
- (5) THE GOVERNMENT HAS NO POWER TO CONSCRIPT CONSCIENTIOUS OBJECTORS FOR NON-COMBAT SERVICE.

INDEED THE COURT ASSUMES WITHOUT DECIDING THAT EACH ONE OF THOSE PROPOSITIONS STATES THE EXACT REVERSE OF THE LAW.

ALL THAT THIS COURT DECIDES IS THAT AS A SINCERE CONSCIENTIOUS OBJECTOR SISSON CANNOT CONSTITUTIONALLY BE SUBJECTED TO MILITARY ORDERS (NOT REVIEWABLE IN A UNITED STATES CONSTITUTIONAL COURT) WHICH MAY REQUIRE HIM TO KILL IN THE VIETNAM CONFLICT.

*Enter forthwith this decision and this court's order granting defendant Sisson's motion in arrest of judgment.*

/s/ Charles Edward Wyzanski, Jr.  
Chief Judge

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

AMENDMENT TO AMENDED MOTION  
IN ARREST OF JUDGMENT

Pursuant to the order of the Court entered March 28, 1969 extending until April 3, 1969 the time for defendant in this case to file a motion in arrest of judgment, defendant further amends his "Amended Motion in Arrest of Judgment" previously filed herein under Rule 34 of the Federal Rules of Criminal Procedure.

Defendant reaffirms all of the grounds formerly pressed in connection with his "Motion to Dismiss Indictment" which was filed on October 21, 1968, as elaborated in his "Memorandum of Points and Authorities in Support of Motion to Dismiss Indictment", also filed on October 21, 1968, and in his letter dated November 27, 1968.

In particular, defendant moves that the Court arrest judgment on the ground that the indictment returned against him does not charge an offense because the Military Selective Service Act of 1967, (and therefore the order issued under that Act directing defendant to report for induction into the armed forces,) is unconstitutional in that it violates the "free exercise" and "non-establishment" clauses of the First Amendment to the United States Constitution.

Before his trial, defendant took this position by asserting his "right of conscience" in his "Motion to Dismiss Indictment", at pages 25-28 and 30-39 of his Memorandum in Support to that Motion, in defendant's affidavit of October 21, 1968 which is Exhibit 1 to the Memorandum in Support of the Motion to Dismiss filed on that date, at page 18 of the "Supplemental Memorandum

dum" filed on November 25, 1968, at page 3 of his letter of November 27, 1968, as well as at the time of the informal pre-trial conference held on March 14, 1969, which is memorialized in part in defendant's letter to the Court dated March 17, 1969. Defendant maintained this position during his trial through cross-examination of government witnesses, by offering his own testimony and the testimony of expert witnesses, by moving for a directed verdict of acquittal at the conclusion of all the evidence, and by requesting jury instruction numbered 4.f. And after trial, defendant again reasserted his constitutional right of conscience in moving for arrest of judgment.

As expressed at page 18 of the "Supplemental Memorandum" of November 25, 1968, defendant maintains that compulsory conscription may not be used for the Vietnam conflict, an undeclared war, without violating his right of conscience. The Military Selective Service Act of 1967, as applied to defendant, violates his right to free exercise of religion guaranteed by the First Amendment to the Constitution of the United States. As applied to defendant, the Act also violates the First Amendment prohibition against an establishment of religion by discriminating against atheists, agnostics, and persons who, like defendant, object to the Vietnam war on the basis of conscience, such conscientious objection not resting on formal religion but on moral and ethical values flowing from reflection, education, practice, sensitivity to competing claims, and a search for a meaningful life.

Respectfully submitted,

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JOHN G. S. FLYM  
Attorney for Defendant

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, JR.

NOTICE OF APPEAL

Notice is hereby given that the United States of America, by its attorney, Paul F. Markham, United States Attorney for the District of Massachusetts, pursuant to Rule 34 of the Federal Rules of Criminal Procedure, appeals to the Supreme Court of the United States from the decision and the granting of defendant's motion in arrest of judgment herein by the United States District Court for the District of Massachusetts on April 1, 1969.

PAUL F. MARKHAM  
United States Attorney

By: /s/ Stanislaw R. J. Suchecki  
STANISLAW R. J. SUCHECKI  
Assistant U. S. Attorney

CERTIFICATE OF SERVICE

SUFFOLK, SS.

Boston, Massachusetts  
April 23, 1969.

I, Stanislaw R. J. Suchecki, Assistant U. S. Attorney, hereby certify that I have this day served a copy of the within Notice of Appeal upon John G. S. Flym, Esquire, counsel for the defendant, by mailing same to him at Flym & Zalkind, 148 State Street, Boston, Massachusetts, in a franked official envelope.

/s/ Stanislaw R. J. Suchecki  
STANISLAW R. J. SUCHECKI  
Assistant U. S. Attorney



## SUPREME COURT OF THE UNITED STATES

No. 305, October Term, 1969

UNITED STATES, APPELLANT

v.

JOHN HEFFRON SISSON, JR.

APPEAL from the United States District Court for the District of Massachusetts.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. This case is placed on the summary calendar and set for oral argument with No. 76 in which certiorari was granted today. In addition to the questions presented on the merits, counsel are requested to discuss in their briefs and oral arguments, not only the issue of jurisdiction under the "arresting a judgment" subdivision of 18 U.S.C. § 3731, but also the questions of whether jurisdiction exists under either the "motion in bar" subdivision or the "decision . . . setting aside or dismissing" subdivision of 18 U.S.C. § 3731.

October 13, 1969

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# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No.

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN HEFFRON SISSON, JR.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MASSACHUSETTS

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## JURISDICTIONAL STATEMENT

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### OPINION BELOW

The opinion of the United States District Court for the District of Massachusetts (Appendix, *infra*, pp. 17-36) is reported at 297 F. Supp. 902.

### JURISDICTION

On April 1, 1969, the district court entered an order granting appellee's motion in arrest of judgment, on the ground that the criminal statute in question (50 U.S.C. App. 462), which makes it a crime, *inter alia*, to refuse to submit to induction as ordered, could not constitutionally be applied to appellee. A notice of appeal to this Court was filed in the district court on April 23, 1969. Under 18 U.S.C. 3731, this Court has jurisdiction, on direct appeal, to review a decision

granting a motion in arrest of judgment based upon the invalidity of the statute on which the indictment is founded. See *United States v. Green*, 350 U.S. 415, and the discussion *infra*, pp. 7-10.

#### QUESTIONS PRESENTED

1. Whether the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 451 *et seq.*) may constitutionally be applied to require induction into the Armed Forces of one who is a non-religious conscientious objector to participation in the Vietnam conflict.

2. Whether, as to such an individual, 50 U.S.C. App. (Supp. III) 456(j), which creates an exemption from combatant training and service in the Armed Forces for those who, "by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form," unconstitutionally discriminates between religious and non-religious conscientious objectors.

#### STATUTE INVOLVED

Section 12(a) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 462(a)) provides, in pertinent part:

Any \* \* \* person charged as herein provided with the duty of carrying out any of the provisions of this title \* \* \*, or the rules or regulations made or directions given thereunder who shall knowingly fail or neglect to perform such duty, \* \* \* shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both \* \* \*.

Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 456(j)) provides, in pertinent part:

Nothing contained in this title \* \* \* shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. \* \* \*

#### STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, appellee was convicted under an indictment which charged that he knowingly and wilfully refused to comply with the order of his local Selective Service board to submit to induction into the Armed Forces.

Prior to trial appellee moved to dismiss the indictment, principally on the ground that there was no constitutional authority to conscript him to serve in an undeclared war. He also contended that the hostilities in Vietnam violated international law and alleged, as a proposed defense, that he reasonably believed the Vietnam conflict to be illegal. In a written opinion which was later amplified, the district court determined that appellee had the requisite standing to raise these issues, but that it had no jurisdiction to decide the "political questions" whether a congressional

declaration of war was necessary to the constitutional validity of American military operations in Vietnam and whether the conduct of the Vietnam hostilities violated international law. The court also ruled that it would not constitute a defense to the charge of intentional refusal to submit to induction that appellee personally regarded the Vietnam conflict as illegal or unjust. *United States v. Sisson*, 294 F. Supp. 511; *United States v. Sisson*, 294 F. Supp. 515.

The evidence at the trial, which is undisputed, showed that appellee had registered with his local board in 1964, when he was a student at Harvard College, and was given a II-S (student deferment) classification. In June 1967, the month of his graduation from Harvard, he was classified II-A, after notifying the local board that he had been accepted by the Peace Corps. In September 1967, after a period of training, appellee was "deselected" by the Peace Corps. On November 20, 1967, he was classified I-A, and took no appeal (Tr. 29-38, 46-47, 71).<sup>1</sup> On February 29, 1968, appellee wrote to his local board stating that he was a conscientious objector and requesting an SSS Form No. 150. The form was mailed to appellee in Mississippi, where he was working as a reporter for *The Southern Courier*, but he never completed or returned the form (Tr. 41-42, 47-50). On March 18, 1968 (having previously been found acceptable after a physical examination), appellee was ordered to report for induction on April 17, 1968. Although he reported to the induction center, he refused to submit to induction (Tr. 43-44, 56-58).

<sup>1</sup> "Tr." refers to the transcript of proceedings at trial.



Appellee testified that he did not return the form for conscientious objectors because he did not consider himself to be a conscientious objector on the basis of religious training and belief and because he was not a conscientious objector to war in any form (Tr. 69-70). He indicated that his refusal to submit to induction was based on his personal conviction that the war in Vietnam was immoral and unlawful. He testified that his beliefs were derived from educational training, moral development, extensive reading of reports about the Vietnam situation, and knowledge of various international treaties and understanding of domestic law as to the necessity for a congressional declaration of war. In particular, he testified that American participation in the fighting in Vietnam violated his ethical beliefs respecting life and the value of man's freedom (Tr. 74-84, 86-87, 95-98). He acknowledged that he "deliberately" refused to submit to induction (Tr. 98-99).

The jury returned a verdict of guilty. Thereafter, appellee made a timely motion in arrest of judgment under Rule 34, F.R. Crim. P., on the grounds, *inter alia*, previously urged in the motion to dismiss<sup>2</sup> (see *supra*, p. 3). The district court first found that appellee understandably had not made a claim to be a conscientious objector before the local board because his beliefs were not religiously grounded but were based upon sincerely held moral and ethical convic-

<sup>2</sup> He also claimed, but the court did not decide the question (see App. 17-18, 23-24), that, if the court could not adjudge the relevant issue of the legality of the war in Vietnam, the trial violated due process.

tions (App. 20-24). It reiterated its prior rulings that appellee had standing to challenge the indictment on the grounds advanced although he had filed no claim with the Selective Service System (App. 19), but that the court had no jurisdiction to decide the political questions whether the military actions of the United States in Vietnam require a declaration of war by Congress or violate international law (*ibid.*).

The court assumed *arguendo* that a conscientious objector, religious or otherwise, may constitutionally be conscripted for some kind of military service in peace or war, and that all persons, including conscientious objectors, could constitutionally be conscripted even for combat service "in time of declared war or in defense of the homeland against invasions" (App. 25-27). It held, nonetheless, that since appellee was sincere in his conscientious objection to participation in a particular war, he had a valid claim "to be constitutionally exempted from combat service in the Vietnam type of situation" (App. 29-30).<sup>3</sup> Noting that there was not a "national need for combat service from [appellee] as distinguished from other forms of service by him" (App. 29), the court concluded that the Military Selective Service Act of 1967, as applied to appellee, violated the "free exercise" and "due process" clauses of the First and Fifth Amendments respectively, insofar as it sought to require him to be inducted upon the possibility of serving in a combatant capacity in a foreign war to which he was a con-

<sup>3</sup> The court stated, however, that it did not follow from this holding that appellee could not constitutionally be conscripted "for non-combat service there or elsewhere" (App. 32).

scientious (but not religious) objector (App. 33). Moreover, the court held that Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. 456(j)), as applied to appellee, violated the "establishment" clause of the First Amendment, in that it unreasonably discriminates between religious and non-religious conscientious objectors (App. 35).<sup>4</sup> Accordingly, the court granted appellee's motion in arrest of judgment (App. 36).

#### THIS COURT HAS JURISDICTION OF THE APPEAL

Although the instant case in our view comes within the provisions of 18 U.S.C. 3731, we recognize that a problem warranting preliminary discussion exists as to whether the case is appealable at all. Here the district court, in granting appellee's motion in arrest of judgment, did not base its action wholly on the allegations of the indictment,<sup>5</sup> but used as a partial predicate for its constitutional rulings the undisputed fact, which appeared from the evidence at trial, that appellee is a non-religious conscientious objector to par-

<sup>4</sup> The court, in characterizing this claim as merely a reiteration of appellee's "older contention" (App. 18), apparently accepted his position that the "establishment" clause argument was implicit in the original motion to dismiss the indictment, in view of his assertion in connection therewith of a "right of conscience."

<sup>5</sup> The indictment, which was in the standard form, merely charged that appellee, on or about April 17, 1968, knowingly refused to obey the order of his local Selective Service board to submit to induction. That appellee claimed to be a conscientious objector was made clear in his memorandum in support of his pre-trial motion to dismiss the indictment; the memorandum, however, did not explain the non-religious or other specific nature of his conscientious objector beliefs. See *United States v. Sisson*, *supra*, 294 F. Supp at 519.

ticipation in the Vietnam conflict. It is our view that this amplification of the indictment by undisputed facts did not except the court's holding from the category of decisions "arresting a judgment of conviction" which Congress has made appealable under the Criminal Appeals Act—18 U.S.C. 3731. That statute provides, insofar as is here relevant:

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

\* \* \* \*

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

So far as we can determine, this Court has never had occasion to define the types of post-verdict rulings by a district court embraced within the statutory class of "a decision arresting a judgment of conviction for insufficiency of the indictment." See *United States v. Green*, 350 U.S. 415; *United States v. Bramblett*, 348 U.S. 503; *United States v. Waters*, 175 F.2d 340 (C.A.D.C.), appeal dismissed on motion of the United States after certification to this Court, 335 U.S. 869. In *Green* three Justices dissented on the appealability question, on the ground that, in order to qualify as "a decision arresting a judgment of conviction for insufficiency of the indictment," a district court may not (even in part) utilize facts not alleged

in the indictment as an "independent ground" in support of its judgment (350 U.S. at 421). Under that view, the district court must place its decision entirely on the invalidity or construction of the relevant statute and may not, as the dissenters in *Green* believed it had done there, partially rely on the insufficiency of the evidence to sustain the conviction (*ibid.*).

Even assuming that the rationale suggested by the dissenters in *Green* reflects the view of the Court, it would not govern the situation presented here. The district court in this case merely used the fact of appellee's non-religious form of conscientious objection as the circumstantial framework for its ruling that the indictment was constitutionally insufficient as applied to appellee. Moreover, this Court has recognized that a stipulation of facts by the parties in a criminal case may properly be treated by the district court as supplementing the indictment (like a bill of particulars), so that a decision dismissing the charge, which utilizes the facts established by the stipulation, is nonetheless appealable to this Court under 18 U.S.C. 3731 where the basis of the decision is the construction or invalidity of the underlying statute. *United States v. Halseth*, 342 U.S. 277; see also *United States v. Fruehauf*, 365 U.S. 146.\*

Here the government accepted the specific facts

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\* Although some language in *United States v. Zisblatt*, 172 F.2d 740, 741-742 (C.A. 2), would seem to support the notion that any recourse to facts outside the indictment, even for such a limited purpose, renders unappealable the district judge's decision, the court of appeals there was not dealing with the situation like that presented here, where the fact which is noticed appears without dispute from the record.



relied on as to the nature of appellee's beliefs so that, as the district court noted, the entire case "in substance \* \* \* arises upon an agreed statement of facts" (App. 19). In these circumstances, to construe the Criminal Appeals Act as precluding appeal of the decision below would unwarrantedly exalt form over substance. There is no genuine difference between this case and one in which the nature of appellee's conscientious objector views would be set forth in the indictment itself, or stipulated to on a motion to dismiss. The instant decision is therefore properly treated, in accordance with the intent of the trial judge, as "arresting a judgment of conviction for insufficiency of the indictment" under the Criminal Appeals Act (see App. 35-36). Since the ruling is, in addition, based on the "invalidity \* \* \* of the statute upon which the indictment \* \* \* is founded,"<sup>7</sup> it follows that the decision below is appealable directly to this Court.

#### THE QUESTIONS ARE SUBSTANTIAL

¶ In holding that the Selective Service Act cannot constitutionally be applied to require the induction for possible combatant service in Vietnam of a registrant who is conscientiously opposed, on purely moral and legal grounds, to American participation in the conflict there, the district court has decided a question of

<sup>7</sup> Here the indictment was based on 50 U.S.C. App. 462, as applied to appellee. But the lower court's ruling not only held that statute invalid in the instant circumstances, it also held unconstitutional the substantive provision relative to the exemption of constitutional objectors—50 U.S.C. App. 456 (j) (see App. 34-36).

great importance in the administration of the Selective Service System. This unique holding is, we believe, erroneous on several distinct grounds.<sup>8</sup>

1. It is our view that the district court's holding that Congress lacks constitutional power to conscript for combatant duty in Vietnam persons who are morally opposed to fighting there is untenable. Nothing in Art. I, Sec. 8 of the Constitution, which confers upon Congress the power to raise and support armies, suggests that individuals called upon to perform military service have the right to substitute their individual judgment for that of the duly elected representatives of the nation as to the wisdom of or necessity for such

<sup>8</sup> A threshold issue involves the district court's ruling that appellee possessed the requisite standing to raise the claim of unconstitutional application of the Selective Service Act, a holding in conflict with decisions of the Second and Ninth Circuits. *United States v. Bolton*, 192 F. 2d 805 (C.A. 2); *United States v. Mitchell*, 369 F. 2d 323 (C.A. 2), certiorari denied, 386 U.S. 972; *Richter v. United States*, 181 F. 2d 591, 594 (C.A. 9), certiorari denied, 340 U.S. 892. Appellee's induction into the Armed Forces would not necessarily have resulted in his being sent to Vietnam. Here the court relied in part (294 F. Supp. at 512-513) on the fact that, at the time a serviceman is ordered to go to Vietnam, other considerations bearing on justiciability may prevent a court from adjudicating his claims that the conflict there is illegal or immoral (see, e.g., *Luftig v. McNamara*, 373 F. 2d 664 (C.A.D.C.), certiorari denied, 387 U.S. 945; *Mora v. McNamara*, 387 F. 2d 862 (C.A.D.C.), certiorari denied, 389 U.S. 934). But that has little bearing on the crucial issue here whether, prior to such time as he is confronted by an order sending him to Vietnam, appellee can be said to have a sufficiently direct interest in the questions he raises concerning the Vietnam situation to accord him legal standing to litigate them. See generally *Flast v. Cohen*, 392 U.S. 83. We preserve that issue for further elaboration if the Court gives plenary consideration to the instant case.

service. Congress has chosen to exempt from combatant military service those persons who, "by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form" (50 U.S.C. App. 456(j)). In doing so, however, it did not purport to exempt persons whose conscientious objection extends only to particular wars and not to participation in war in general. *United States v. Spiro*, 384 F. 2d 159 (C.A. 3), certiorari denied, 390 U.S. 956; *Taffs v. United States*, 208 F. 2d 329, 331 (C.A. 8), certiorari denied, 347 U.S. 928; *United States v. Hartman*, 209 F. 2d 366, 370-371 (C.A. 2); see *Sicurella v. United States*, 348 U.S. 385. The district court agreed that, in time of declared war or in defense of the homeland, Congress could validly limit the granting of an objector exemption to those individuals having conscientious beliefs touching all armed conflicts among nations, rather than any specific war. It rested its decision here, however, on a determination that the dictates of individual conscience were qualitatively superior to "the country's present need" for combat service from individuals like appellee in Vietnam (App. 33).

This balancing of interests by the district court so as to sanction "selective" conscientious objection was beyond the proper scope of its functions. The determination of the classes of persons of whom to require combatant service in the Armed Forces is (within the boundaries imposed by the Constitution against invidious discrimination and establishment of religion) reserved to Congress alone. The specific issue of the nation's need for an individual in a particular armed conflict is *a fortiori* of a "political"

character unsuited for judicial scrutiny. See, *e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 788-789; *Ludecke v. Watkins*, 335 U.S. 160, 170; *Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111; *Luftig v. McNamara*, 373 F. 2d 664 (C.A.D.C.), certiorari denied, 387 U.S. 945; and see generally *Baker v. Carr*, 369 U.S. 186, 211-214. Congress may lawfully conscript for military service in time of peace or war. *United States v. O'Brien*, 391 U.S. 367, 377; *Hamilton v. Regents of the University of California*, 293 U.S. 245; *Selective Draft Law Cases*, 245 U.S. 366; *United States v. Williams*, 302 U.S. 46; *United States v. Henderson*, 180 F. 2d 711 (C.A. 7), certiorari denied, 339 U.S. 963; *Etcheverry v. United States*, 320 F. 2d 873 (C.A. 9), certiorari denied, 375 U.S. 930; *Warren v. United States*, 177 F. 2d 596, 599 (C.A. 10), certiorari denied, 338 U.S. 947; *United States v. Hogans*, 369 F. 2d 359 (C.A. 2); see also, denying certiorari, *Holmes v. United States*, 391 U.S. 936; *Hart v. United States*, 391 U.S. 956; *McArthur v. Clifford*, 393 U.S. 1002. It is for Congress to decide who will serve and when he will serve.

2. As an alternative, "narrower" holding, the district court ruled that Section 6(j) of the Selective Service Act violates the "establishment" clause of the First Amendment by invidiously discriminating, in the grant of the conscientious objector exemption, against those whose objection is founded on moral rather than religious beliefs. The court's determination was based on its conclusion that "it is difficult to imagine any ground for a statutory distinction [between religious and non-religious conscientious ob-



jectors] except religious prejudice" (App. 35). The question decided is clearly substantial\* and was expressly left open by this Court in *United States v. Seeger*, 380 U.S. 163. There, to avoid constitutional problems of a similar nature, Section 6(j) was construed as reflecting the intent of Congress to accord the broadest possible meaning to the term "religious \* \* \* belief" as then defined.<sup>10</sup> The Court has, how-

\* The issue is raised in two presently pending petitions for writs of certiorari: *Vaughn v. United States*, No. 23 Misc., 1969 Term, and *McQuerry v. United States*, No. 88 Misc., 1969 Term. See also *Welsh v. United States*, No. 76, 1969 Term. In opposing certiorari in those cases we have taken the position that Congress, consistent with the First Amendment, may exclude from conscientious objector status those whose opposition to war stems, in the words of amended Section 6(j), from "essential political, sociological, or philosophical views or a merely personal moral code" (see note 10, *infra*). We recognize that, in view of the filing of this jurisdictional statement, the Court may wish to act on all of these cases simultaneously, and may thus desire to defer action on these petitions should plenary consideration be given to the instant case.

<sup>10</sup> At the time *Seeger* was decided, Section 6(j) read: Nothing contained in this title \* \* \* shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. \* \* \*

In 1967 the statute was amended to its present form to comply with the effect of the *Seeger* holding:

Nothing contained in this title \* \* \* shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously



ever, sustained similar conscientious objector provisions of the 1917 draft law against a constitutional challenge identical to that made below. *Selective Draft Law Cases*, 245 U.S. 366, 389-390. And the courts of appeals which have considered the issue have unanimously upheld the statute against the claim that it operates to "establish" religion in violation of the First Amendment. *E.g.*, *United States v. Bendik*, 220 F. 2d 249 (C.A. 2); *George v. United States*, 196 F. 2d 445 (C.A. 9), certiorari denied, 344 U.S. 843; *Clark v. United States*, 236 F. 2d 13 (C.A. 9), certiorari denied, 352 U.S. 882; *Etcheverry v. United States*, 320 F. 2d 873 (C.A. 9), certiorari denied, 375 U.S. 930.

The limitation of the conscientious objector exemption to persons whose objection stems from religious beliefs does not reflect a congressional preference or "prejudice" for religion. Rather, it represents a legislative judgment that convictions against war which stem from a belief in a directing power beyond human control are qualitatively different from personal beliefs, no matter how sincere, and that limiting the scope of exemption to those objectors whose claim is religiously grounded provides a manageable, tangible test susceptible of administrative and judicial application. Congress could therefore legitimately choose to set up a classification which provides exemption only to those who fall in the first category.

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opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. \* \* \*

## CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should note probable jurisdiction.

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JUNE 1969.

## APPENDIX

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### UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 68-237-W

UNITED STATES OF AMERICA

v.

JOHN HEFFRON SISSON, Jr.

#### *Opinion*

April 1, 1969

WYZANSKI, *Chief Judge*:

#### A. INTRODUCTION

March 21, 1969, in the United States District Court sitting in Boston, a jury returned a verdict that John Heffron Sisson, Jr. was guilty of unlawfully, knowingly, and wilfully having refused to comply with the order of Local Board No. 114 to submit to induction into the armed forces of the United States, in violation of the Military Selective Service Act of 1967. Title 50, Appendix, United States Code, Section 462.32 Code of Federal Regulations 1632.14.

Pursuant to Rule 34 of the Rules of Criminal Procedure, Sisson on March 28, 1969, filed an amended motion in arrest of judgment. Adequate reference is made to earlier contentions. A new point is also raised: that the judicial power vested in this court by Article III of the United States Constitution does not give jurisdiction to adjudicate the merits of a criminal

case in which the court is precluded, by the doctrine of so-called "political questions" or otherwise, from deciding relevant constitutional, domestic, and international law questions raised by defendant. It is said that a trial designed to exclude relevant issues violates the "due process" clause of the Fifth Amendment.

Important as is the new issue, defendant indicated both before and during the trial that he also intended to preserve his older contention that no offense is charged in the indictment because it is laid under a statute, which, as applied to him, violates the provision of the First Amendment that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" and the "due process" clause of the Fifth Amendment.

It would have been better practice to make in the motion in arrest of judgment a more detailed reference to, and repetition of, that earlier contention. But, of course, at every stage the court is required to bear in mind constitutional and jurisdictional issues which have been raised and remain of vital consequence. Furthermore, this court on March 26 provided that until April 3 defendant could file a motion in arrest. No doubt, defendant will reasonably make his motion in arrest even clearer.

This court in this opinion addresses itself not to the new point but to further consideration of the never-abandoned issue whether the government can constitutionally require combat service in Vietnam of a person who is conscientiously opposed to American military activities in Vietnam because he believes them immoral and unjust, that belief resting not upon formal religion but upon the deepest convictions and ethical commitments, apart from formal religion, of which a man is capable.

While Sisson has raised and not abandoned other issues, most of them have already been disposed of by

earlier rulings in this case, *United States v. Sisson*, 294 F. Supp. 511, 515, 520 (D. Mass., 1968). Out of an abundance of caution this court repeats the following rulings already made, of which the first is peculiarly pertinent.

November 25, 1968 this court's opinion held that *under present circumstances*, described in that opinion, *Sisson has the necessary standing to raise the issues he tenders*. See 294 F. Supp. 511, 512-513.

The same opinion held that this court has no jurisdiction to decide the "political question" whether the military actions of the United States in Vietnam require as a constitutional basis a declaration of war by Congress.

November 26, 1968 in a second opinion this court held it has no jurisdiction to decide the "political question" whether American military operations in Vietnam violate international law. The holding is expanded and clarified in this court's order of December 3, 1968.

That order also ruled that if the Government should prove defendant intentionally refused to comply with a duly authorized order of his draft board to submit to induction then under the act it would not be open to defendant to offer as a statutory excuse that he regarded the war as illegal, immoral, or unjust.

#### B. THE FACTS

From the transcript of the jury trial and the exhibits then admitted, the facts appear virtually without dispute. Indeed in substance the case arises upon an agreed statement of facts.

The usual preliminaries having been completed, Local Board No. 114, Middlesex County, Massachusetts, on Form 252, executed and mailed to Sisson March 18, 1968 an order to report for induction on



April 17, 1968. Sisson received the order. On the scheduled day he reported to the local board and from there went to the Boston induction center, as required. At the Boston center, Sisson, after the officer in charge had painstakingly warned him of the consequences, deliberately refused to take the step forward which is, as he understood, the symbolic act of accepting induction.

The evidence shows that the proceedings were in every respect regular. Sisson has never made complaint that there was any error with respect to his registration, the chronological order in which he was called, his physical, mental, and moral examinations, or any other procedural step.

Sisson does not now and never did claim that he is or was in the narrow statutory sense a religious conscientious objector.

Sisson graduated in 1963 from the Phillips Exeter Academy and in 1967 from Harvard College. He enlisted in the Peace Corps in July 1967, but after training he was, for reasons that have no moral connotations, "deselected" in September 1967. In January 1968 he went to work as a reporter for *The Southern Courier*, published in Montgomery, Alabama. That paper assigned him to work in Mississippi, where he was when he received the induction order.

The first formal indication in the record that Sisson had conscientious scruples is a letter of February 29, 1968 in which he notified Local Board No. 114 that "I find myself to be conscientiously opposed to service in the Armed Forces. Would you please send me SSS Form No. 150 so that I might make my claim as a conscientious objector." On receiving the form, Sisson concluded that his objection not being religious, within the administrative and statutory definitions incorporated in that form, he was not entitled to have

the benefit of the form. He, therefore, did not execute it.

But, although the record shows no earlier formal indication of conscientious objection, Sisson's attitude as a nonreligious conscientious objector has had a long history. Sisson himself referred to his moral development, his educational training, his extensive reading of reports about and comments on the Vietnam situation, and the degree to which he had familiarized himself with the U.N. Charter, the charter and judgments of the Nuremberg Tribunal, and other domestic and international matters bearing upon the American involvement in Vietnam.

On the stand Sisson was diffident, perhaps beyond the requirements of modesty. But he revealed sensitiveness, not arrogance or obstinacy. His answers lacked the sharpness that sometimes reflects a prepared mind. He was entirely without eloquence. No line he spoke remains etched in memory. But he fearlessly used his own words, not mouthing formulae from court cases or manual for draft avoidance.

There is not the slightest basis for impugning Sisson's courage. His attempt to serve in the Peace Corps, and the assignment he took on a Southern newspaper were not acts of cowardice or evasion. Those actions were assumptions of social obligations. They were in the pattern of many conscientious young men who have recently come of age. From his education Sisson knows that his claim of conscientious objection may cost him dearly. Some will misunderstand his motives. Some will be reluctant to employ him.

Nor was Sisson motivated by purely political considerations. Of course if "political" means that the area of decision involves a judgment as to the conduct of a state, then any decision as to any war is not

without some political aspects. But Sisson's table of ultimate values is moral and ethical. It reflects quite as real, pervasive, durable, and commendable a marshalling of priorities as a formal religion. It is just as much a residue of culture, early training, and beliefs shared by companions and family. What another derives from the discipline of a church, Sisson derives from the discipline of conscience.

Thus, Sisson bore the burden of proving by objective evidence that he was sincere. He was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion.

Sisson's views are not only sincere, but, without necessarily being right, are reasonable. Similar views are held by reasonable men who are qualified experts. The testimony of Professor Richard Falk of Princeton University and Professor Howard Zinn of Boston University is sufficient proof. See also Ralph B. Potter, *New Problems for Conscience in War*, American Society for Christian Ethics, January 19, 1968; *War and Moral Discourse*, John Knox Press, 1969.

### C. LIMITATION OF ISSUES

The facts found by the jury and recited above raise many points of law, some presented early in this case, others raised explicitly or inferentially in the amended motion filed in arrest of judgment.

If any one of those points is inconvertibly sound, the court should so state and probably not give rulings on others. Such additional rulings would be gratuitous and violative of the canon of avoidance of unnecessary constitutional adjudications. Hence if this court were a court of last resort, this court would adopt the prudential principle of striking for the jugular alone.

But this inferior court cannot say that any of the

issues is clear. It cannot by ruling on one surely make the others moot. This court's ruling is appealable. Hence any constitutional issue whatsoever which defendant here alleged as a ground for having judgment arrested remains open in an appellate court.

More significantly at least all those issues which are raised under the First Amendment are so interlocked textually and substantively, that one of those issues cannot properly be considered apart from the others. Sound interpretation of any phrase of the Amendment requires reconciliation both with every other phrase of that Amendment and with the Constitution as a whole.

Therefore, it is meet for this opinion to consider both the broad contention, growing principally out of "the free exercise of" religion phrase, that no statute can require combat service of a conscientious objector whose principles are either religious or akin thereto, and the narrower contention growing principally out of "the establishment" of religion phrase, that the 1967 draft act invalidly discriminates in favor of certain types of religious objectors to the prejudice of Sisson. An appellate court might find it suitable to render its judgment solely on the latter issue. This inferior court, as already explained, is not so conveniently situated. In candor it must be added that this court found its understanding of the narrow issue much clarified by first analyzing, as will be seen, the broad issue.

While this court believes it cannot escape a full survey of the First Amendment issues, the court does not now deem it necessary to address itself to the new contentions in the amended motion, filed March 28 in arrest of judgment. Those contentions as to the judicial power of the United States Courts are of the most serious nature. If defendant's other grounds for

his amended motion in arrest of judgment do not prevail in the Supreme Court, that court on doubt will have to rule upon the new contentions with respect to judicial power, or to remand the case to this court for a ruling. But that bridge need not be crossed if this opinion has effectively found another way of crossing the stream.

#### D. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The First Amendment issues are open to Sisson in this and other courts even though Sisson did not raise them before the draft board or in any other step in the administrative process. What Sisson is here doing is challenging the constitutionality of the 1967 Act as applied to him. There was no realistic opportunity to make such a challenge until now. Whatever may be academic theory, no administrative agency, such as a draft board, believes it has power or, practically, would exercise power, to declare unconstitutional the statute under which it operates. Maybe a day will come when an administrative agency's right and duty not to apply an unconstitutional statutory provision are generally acknowledged, practiced and approved. Under present practice the first time a contention of unconstitutionality of a statutory provision may effectively be made is in a court.

Sisson waited until the administrative process was over because he had no choice. Cf. *Clark v. Gabriel*, 393 U.S. 256, 259 (1968).

This court waited until the jury had given a guilty verdict because only then did the judge have no choice.

In Sisson's case the judges have become the first and the last before whom the constitutional issues can be effectively raised as a matter of law.



E. THE CONSTITUTIONAL POWER OF CONGRESS TO DRAFT  
CONSCIENTIOUS OBJECTORS FOR COMBAT DUTY IN A  
DISTANT CONFLICT NOT PURSUANT TO A DECLARED WAR

Indubitably Congress has constitutional power to conscript the generality of persons for military service in time of war. *Selective Draft Law Cases*, 245 U.S. 366 (1918). That is, there is not a constitutional gap, nor a defect of power to conscript in time of war, any more than there is a defect of power to raise an army of volunteers. Daniel Webster's contrary views have been superseded. See *Holmes v. U.S.*, 391 U.S. 936, 940 note (1968). His historical reading of the past was better than of the future.

Whether this constitutional power exists in time of peace has been thought by some justices of the Supreme Court to be an open question. See *Holmes v. U.S.*, 391 U.S. 936, 938-949 (1968); *Hart v. U.S.* 391 U.S. 956 (1968); *McArthur v. Clifford*, 393 U.S. 1002 (1968). However, this court, until otherwise authoritatively instructed, assumes that Congressional power to conscript for war embraces Congressional power in time of peace to conscript for later possible war service. But the assumption is not fully supported despite what this court indicated in 294 F. Supp. at p. 513, by *Hamilton v. University of California*, 293 U.S. 245 (1934). *Hamilton* goes on the narrow ground that the Fourteenth Amendment does not confer "the right to be students in the state university free from the obligation to take military training as one of the conditions of attendance," Thomas Reed Powell, *Conscience and the Constitution* in William T. Hutchinson, Editor, *Democracy and National Unity*, The University of Chicago Press, 1941, p. 15 of the reprint. The opinion of Justice Butler, it is true, proceeded on the premise that the conscription power was the same in peace as in war. But, Justice Cardozo, speaking

for himself, Justice Brandeis, and Justice Stone, observed that "There is no occasion at this time to mark the limits of governmental power in the exaction of military service when the nation is at peace" (p. 265).

This court's assumption that Congress has the general power to conscript in time of peace is not dispositive of the specific question whether that general power is subject to some exception or immunity available to a draftee because of a constitutional restriction in favor of individual liberty. See Powell, above, at pp. 6, 18.

However, some have supposed the specific question is foreclosed. At the head of the procession is Judge Learned Hand who a decade ago, before the Vietnam conflict sharpened our focus, announced in the Oliver Wendell Holmes Lectures on *The Bill of Rights*, Harvard University Press, (1958), p. 64, (same book republished with same pagination, Athenaeum Press, 1964), without pausing for a footnote, that "We could, though we do not, lawfully require all citizens to do military service regardless of their religious principles."

No doubt Judge Learned Hand recalled the argument Mr. John W. Davis made in *Macintosh v. U.S.* 283 U.S. 605 (1931), that it is a "fixed principle of our Constitution . . . that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so" (p. 623). Judge Hand remembered that the argument of Mr. Davis had been rejected by Justice Sutherland, 283 U.S. at pages 623-624, in language quoted by Justice Butler at p. 264 in *Hamilton*:

The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to re-

lieve him . . . [T]he war powers . . . include . . . the power, *in the last extremity*, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. (Emphasis added).

Sweeping as the foregoing quotation seems to be, there are restrictive implications inherent in the use of the phrase "in the last extremity." And while Justice Sutherland does use the comprehensive words "to compel the armed service of any citizen", it is arguable that he was not seeking prematurely to answer a question which a few years later Thomas Reed Powell treated as still undecided, that is "whether a conscientious objector could constitutionally be required to kill." Powell at p. 17.

The sum of the matter is that a careful scholar would conclude in 1969; as Professor Powell did in 1941, that "Notwithstanding all judicial declarations, it has not been actually decided that a conscientious objector, not within any group exempted by Congress, can be put into the front-line trenches or put into the army where certain refusals to obey orders may be punished by death." See Powell, above, at p. 18.

Yet, open as the issue may be, *this Court in the following discussion assumes that a conscientious objector, religious or otherwise, may be conscripted for some kinds of service in peace or in war. This court further assumes that in time of declared war or in the defense of the homeland against invasion, all persons may be conscripted even for combat service.*

But the precise inquiry this court cannot avoid is whether now Sisson may be compelled to submit to non-justiciable military orders which may require him to render combat service in Vietnam. Cf. *In Re Jeni-*

son, 375 U.S. 14 (1963); same case on remand 267 Minn. 136, 125 N.W. (2d) 588 (1964).

Implicit is the problem whether in deciding the issue as to the constitutional claim of a conscientious objector to be exempt from combat service, circumstances alter cases. (See the admittedly distinguishable case of jury duty, *In Re Jenison* above.)

This is not an area of constitutional absolutism. It is an area in which competing claims must be explored, examined, and marshalled with reference to the Constitution as a whole.

There are two main categories of conflicting claims. First, there are both public and private interests in the common defense. Second there are both public and private interests in individual liberty.

Every man, not least the conscientious objector, has an interest in the security of the nation. Dissent is possible only in a society strong enough to repel attack. The conscientious will to resist springs from moral principles. It is likely to seek a new order in the same society, not anarchy or submission to a hostile power. Thus conscience rarely wholly disassociates itself from the defense of the ordered society within which it functions and which it seeks to reform not to reduce to rubble.

In parallel fashion, every man shares and society as a whole shares an interest in the liberty of the conscientious objector, religious or not. The freedom of all depends on the freedom of each. Free men exist only in free societies. Society's own stability and growth, its physical and spiritual prosperity are responsive to the liberties of its citizens, to their deepest insights, to their free choices, "That which opposes also fits."

Those rival categories of claims cannot be mathematically graded. There is no table of weights and

measures. Yet there is no insuperable difficulty in distinguishing orders of magnitude.

The sincerely conscientious man, whose principles flow from reflection, education, practice, sensitivity to competing claims, and a search for a meaningful life, always brings impressive credentials. When he honestly believes that he will act wrongly if he kills his claim obviously has great magnitude. That magnitude is not appreciably lessened if his belief relates not to war in general, but to a particular war or to a particular type of war. Indeed a selective conscientious objector might reflect a more discriminating study of the problem, a more sensitive conscience, and a deeper spiritual understanding.

It is equally plain that when a nation is fighting for its very existence there are public and private interests of great magnitude in conscripting for the common defense all available resources, including manpower for combat.

But a campaign fought with limited forces for limited objects with no likelihood of a battlefront within this country and without a declaration of war is not a claim of comparable magnitude.

Nor is there any suggestion that in present circumstances there is a national need for combat service from Sisson as distinguished from other forms of service by him. The want of magnitude in the national demand for combat service is reflected in the nation's lack of calls for sacrifice in any serious way by civilians.

Before adding up the accounts and striking a balance there are other items deserving notice.

Sisson is not in a formal sense a religious conscientious objector. His claim may seem less weighty than of one who embraces a creed which recognizes a Supreme Being, and which has as part of its train-



ing and discipline opposition to war in any form. It may even seem that the Constitution itself marks a difference because in the First Amendment reference is made to the "free exercise of" "religion", not to the free exercise of conscience. Moreover, Sisson does not meet the 1967 congressional definition of religion. Nor does he meet the dictionary definition of religion.

But that is not the end of the matter. The opinions in *U.S. v. Seeger*, 380 U.S. 163 (1965) disclosed wide vistas. The court purported to look only at a particular statute. It piously disclaimed any intent to interpret the Constitution or to examine the limitations which the First and Fifth Amendments place upon Congress. But commentators have not forgotten the Latin tag *pari passu*. See Note *The Conscientious Objector and The First Amendment: There but for the Grace of God*, 34 U. Chi. L. Rev. 79 (1966); James B. White, *Processing Conscientious Objector Claims: A Constitutional Inquiry*, 56 Cal. L. Rev. 652 (1968); Hugh C. Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 Va. L. Rev. 1355 (1968); John Mansfield, *Conscientious Objection—1964 Term*, 1965 Religion and the Public Order 1.

The rationale by which Seeger and his companions on appeal were exempted from combat service under the statute is quite sufficient for Sisson to lay valid claim to be constitutionally exempted from combat service in the Vietnam type of situation.

Duty once commonly appeared as the "stern daughter of the voice of God." Today to many she appears as the stern daughter of the voice of conscience. It is not the ancestry but the authenticity of the sense of duty which creates constitutional legitimacy.

Some suppose that the only reliable conscience is one responsive to a formal religious community of memory and hope. But in *Religion In The Making*, Alfred North Whitehead taught us that "religion is what the individual does with his own solitariness." pp. 16, 47, 58.

Others fear that recognition of individual conscience will make it too easy for the individual to perpetrate a fraud. His own word will so often enable him to sustain his burden of proof. Cross-examination will not easily discover his insincerity.

*Seeger* cut the ground from under that argument. So does experience. Often it is harder to detect a fraudulent adherent to a religious creed than to recognize a sincere moral protestant. See Justice Jackson's dissent in *U.S. v. Ballard*, 322 U.S. 78, 92-95 (1944). We all can discern Thoreau's integrity more quickly than we might detect some churchman's hypocrisy.

The suggestion that courts cannot tell a sincere from an insincere conscientious objector underestimates what the judicial process performs every day. Ever since, in *Edginton v. Fitzmaurice* (1882) L.R. 29 Ch. Div. 359, Bowen L.J. quipped that "the state of a man's mind is as much a fact as the state of his digestion", each day courts have applied laws, criminal and civil, which make sincerity the test of liability.

There have been suggestions that to read the Constitution as granting an exemption from combat duty in a foreign campaign will immunize from public regulation all acts or refusals to act dictated by religious or conscientious scruple. Such suggestions fail to note that there is no need to treat, and this court does not treat, religious liberty as an absolute. The most sincere religious or conscientious believer may be validly punished even if in strict pursuance of his creed or principles, he fanatically assassinates an op-

ponent, or practices polygamy, *Reynolds v. U.S.*, 98 U.S. 154 (1878), or employs child labor, *Prince v. Massachusetts*, 321 U.S. 158 (1944). Religious liberty and liberty of conscience have limits in the face of social demands of a community of fellow citizens. There are, for example, important rival claims of safety, order, health, and decency.

Nor is it true that to recognize liberty of conscience and religious liberty will set up some magic line between nonfeasance and misfeasance. A religiously motivated failure to discharge a public obligation may be as serious a crime as a religiously motivated action in violation of law. We may, argumentatively, assume that one who out of religious or conscientious scruple refuses to pay a general income or property tax, assessed without reference to any particular kind of contemplated expenditure, is civilly and criminally liable, regardless of his sincere belief that he is responding to a divine command not to support the government.

Most important, it does not follow from a judicial decision that *Sisson* cannot be conscripted to kill in Vietnam that he cannot be conscripted for non-combat service there or elsewhere.

It would be a poor court indeed that could not discern the small constitutional magnitude of the interest that a person has in avoiding all helpful service whatsoever or in avoiding paying all general taxes whatsoever. His objections, of course, may be sincere. But some sincere objections have greater constitutional magnitude than others.

There are many tasks, technologically or economically related to the prosecution of a war, to which a religious or conscientious objector might be constitutionally assigned. As Justice Cardozo wrote "Never in our history has the notion been accepted,

or even, it is believed, advanced, that acts thus indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state." *Hamilton v. University of California*, 293 U.S. 245, 267 (1934).

Sisson's case being limited to a claim of conscientious objection to combat service in a foreign campaign, this court holds that the free exercise of religion clause in the First Amendment and the due process clause of the Fifth Amendment prohibit the application of the 1967 draft act to Sisson to require him to render combat service in Vietnam.

The chief reason for reaching this conclusion after examining the competing interests is the magnitude of Sisson's interest in not killing in the Vietnam conflict as against the want of magnitude in the country's present need for him to be so employed.

The statute as here applied creates a clash between law and morality for which no exigency exists, and before, in Justice Sutherland's words, "the last extremity" or anything close to that dire predicament has been glimpsed, or even predicted, or reasonably feared.

When the state through its laws seeks to override reasonable moral commitments it makes a dangerously uncharacteristic choice. The law grows from the deposits of morality. Law and morality are, in turn, debtors and creditors of each other. The law cannot be adequately enforced by the courts alone, or by courts supported merely by the police and the military. The true secret of legal might lies in the habits of conscientious men disciplining themselves to obey the law they respect without the necessity of judicial and administrative orders. When the law treats a reasonable, conscientious act as a crime it subverts its own power. It invites civil disobedience. It impairs the very habits which nourish and preserve the law.

**F. THE CONSTITUTIONAL POWER OF CONGRESS TO DISCRIMINATE AS IT DID IN THE 1967 DRAFT ACT BETWEEN THE DRAFT STATUS OF SISSON AS A CONSCIENTIOUS OBJECTOR AND THE DRAFT STATUS OF ADHERENTS TO CERTAIN TYPES OF RELIGIONS.**

The Supreme Court may not address itself to the broad issue just decided. Being a court of last resort, it, unlike an inferior court, can confidently rest its judgment upon a narrow issue. Indeed *Seeger* foreshadows exactly that process. So it is incumbent on this court to consider the narrow issue, whether the 1967 Act invalidly discriminates against Sisson as a non-religious conscientious objector.

The draft act now limits "exemption from combat training and service" to one "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form" 50 U.S.C. App. Section 456(j), commonly cited as Section 6(j) of the Act as amended.

A Quaker, for example, is covered if he claims belief in the ultimate implications of William Penn's teaching.

Persons trained in and believing in other religious ways may or may not be covered. A Roman Catholic obedient to the teaching of Thomas Aquinas and Pope John XXIII might distinguish between a just war in which he would fight and an unjust war in which he would not fight. Those who administer the Selective Service System opine that Congress has not allowed exemption to those whose conscientious objection rests on such a distinction. See Lt. Gen. Lewis B. Hershey, *Legal Aspects of Selective Service*, U.S. Gov. Printing Office, January 1, 1969, pp. 13-14. This court has a more open mind.

However, the administrators and this court both agree that Congress has not provided a conscientious



objector status for a person whose claim is admittedly not formally religious.

In this situation Sisson claims that even if the Constitution might not otherwise preclude Congress from drafting him for combat service in Vietnam, the Constitution does preclude Congress from drafting him under the 1967 Act. The reason is that this Act grants conscientious objector status solely to religious conscientious objectors but not to non-religious objectors.

Earlier this opinion noted that it is practical to accord the same status to non-religious conscientious objectors as to religious objectors. Moreover, it is difficult to imagine any ground for a statutory distinction except religious prejudice. In short, in the draft act Congress unconstitutionally discriminated against atheists, agnostics, and men, like Sisson, who, whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings.

This court, therefore, concludes that in granting to the religious conscientious objector but not to Sisson a special conscientious objector status, the Act, as applied to Sisson, violates the provision of the First Amendment that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." *Torcaso v. Watkins*, 367 U.S. 488 (1961) Cf. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

In the words of Rule 34, the indictment of Sisson "does not charge an offense".

This court's "decision arresting a judgment of conviction for insufficiency of the indictment . . . is based upon the invalidity . . . of the statute upon which the indictment is founded" within the meaning

of those phrases as used in 18 U.S.C. Section 3731 *U.S. v. Green*, 350 U.S. 415, 416 (1956); *U.S. v. Bramblett*, 348 U.S. 503, 504 (1955). Therefore, "an appeal may be taken by and on behalf of the United States . . . direct to the Supreme Court of the United States."

To guard against misunderstanding, this Court has not ruled that:

(1) The Government has no right to conduct Vietnam operations; or

(2) The Government is using unlawful methods in Vietnam; or

(3) The Government has no power to conscript the generality of men for combat service; or

(4) The Government in a defense of the homeland has no power to conscript for combat service anyone it sees fit; or

(5) The Government has no power to conscript conscientious objectors for non-combat service.

Indeed the Court assumes without deciding that each one of those propositions states the exact reverse of the law.

All that this Court decides is that as a sincere conscientious objector Sisson cannot constitutionally be subjected to military orders (not reviewable in a United States constitutional court) which may require him to kill in the Vietnam conflict.

Enter forthwith this decision and this court's order granting defendant Sisson's motion in arrest of judgment.

CHARLES EDWARD WYZANSKI, JR.,  
Chief Judge.



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# In the Supreme Court of the United States.

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OCTOBER TERM, 1969.

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No. 305.

UNITED STATES OF AMERICA,

*Appellant,*

*v.*

JOHN HEFFRON SISSON, JR.,

*Appellee.*

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## MOTION TO AFFIRM.

Pursuant to Rule 16.1(d) of the Rules of the Supreme Court of the United States, appellee, John Heffron Sisson, Jr., moves to affirm the order of the United States District Court for the District of Massachusetts granting his motion in arrest of a judgment of conviction. The opinion of the District Court is reported at 297 F. Supp. 902.

## Questions Presented.

1. Whether the Military Selective Service Act of 1967, 50 U.S.C. App. §§ 451 *et seq.* (hereinafter sometimes referred to as the "Act"), violates the First Amendment's directive that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" when applied to compel military service by some conscientious objectors, but not others.



2. Whether Congress has the power to compulsorily conscript a conscientious objector to fight in time of peace.

3. Whether Congress has the power to procure manpower for the military by compulsory conscription in time of peace.

4. Whether the legality and constitutionality of the Government's military participation in the Vietnam conflict is a justiciable issue and, if it is not, whether the District Court has jurisdiction over a criminal prosecution wherein the illegality of such participation is relied upon as a defense.

#### **Statute Involved.**

Section 4(a) of the Act, 50 U.S.C. App. § 454(a) provides in pertinent part:

"The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces. . . ."

Section 6(j) of the Act, 50 U.S.C. App. § 456(j) provides in pertinent part:

"Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code. . . ."

Section 12(a) of the Act, 50 U.S.C. App. § 462(a), provides in pertinent part:

"Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both . . ."

#### **Statement.**

Sisson is a nonreligious conscientious objector to participation in the Vietnam conflict. (Jurisdictional Statement, pp. 7-8.) He was indicted and convicted on the charge of refusal to submit to induction.

In moving for arrest of judgment, Sisson renewed claims first advanced in his pretrial motion to dismiss the indictment on the grounds that (1) the Act violates the non-establishment and free exercise clauses of the First Amendment, or alternatively the right to be a conscientious objector under the Ninth Amendment; (2) the Act is unconstitutional because the Vietnam war is illegal, under both domestic and international law, and Congress has no constitutional power to raise armies for illegal wars; (3) the Act is unconstitutional because Congress has no power to authorize compulsory conscription into the military during peace time; and (4) if the District Court cannot adjudicate the legality of the Vietnam war because of the "political question" doctrine, then either the court has no jurisdiction under Article III of the Constitution to adjudicate

Sisson's guilt or innocence, or the court cannot exercise such jurisdiction without violating due process by depriving Sisson of a potentially valid defense.

The District Court found Sisson to be a sincere conscientious objector, holding genuine and profound ethical and moral values, but lacking the "religious training and belief" prescribed by the Act. The District Court also found Sisson's belief that the war is illegal to be a reasonable belief. 297 F. Supp. at 904-905.

The District Court granted Sisson's motion in arrest of judgment, holding that (1) the Act violates the "non-establishment" clause by discriminating between religious and nonreligious conscientious objectors; and (2) the Act violates the "free exercise" clause by compelling a conscientious objector to fight in an undeclared foreign war. The District Court rejected Sisson's contentions that (3) Congress has no power to draft a conscientious objector, whether in time of peace or in time of war; (4) Congress has no power to conscript anyone during peace time; and (5) the District Court can have no jurisdiction of the offense charged if the legality of the Vietnam war is a political question.

The District Court expressly based its decision arresting the judgment of conviction for insufficiency of the indictment "upon the invalidity . . . of the statute upon which the indictment . . . is founded," within the meaning of this phrase as used in 18 U.S.C. § 3731. 297 F. Supp. at 912.

### **Jurisdiction.**

Appellee concurs with appellant that 18 U.S.C. § 3731 confers jurisdiction upon this Court to review on direct appeal the decision of the District Court and he adopts the reasons set forth in the Jurisdictional Statement, pp. 7-10.

It is self-evident that the questions presented are of general importance. The District Court construed the indictment, a matter not presently open to review, and explicitly based its finding of insufficiency on the unconstitutionality of the Act. Moreover, the decision below conflicts with decisions with respect to which petitions for writs of certiorari are pending; *Vaughn v. United States*, No. 116 Misc., 1969 Term; *McQueary v. United States*, No. 88 Misc., 1969 Term; and *Welsh v. United States*, No. 76, 1969 Term.

Of course, the jurisdiction of this Court is not limited to the questions presented by appellee. It extends to certain questions decided in favor of the Government by the District Court and it is now open to this Court to inquire whether the judgment can be sustained upon rejected grounds which challenge the validity of the Act. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 329-330; Stern & Gressman, *Supreme Court Practice*, p. 357 (4th ed. 1969).

### Argument.

#### 1. THE ACT VIOLATES THE FIRST AMENDMENT PROHIBITION AGAINST LAWS RESPECTING AN ESTABLISHMENT OF RELIGION.

The District Court held that the Act violates the First Amendment provision that "Congress shall make no law respecting an establishment of religion" because it requires a nonreligious conscientious objector, like Sisson, to be subject to conscription to kill in Vietnam but does not impose the same requirement on the religious conscientious objector. It is undisputed that Sisson is a nonreligious conscientious objector. (Jurisdictional Statement, pp. 7-8.)

The Act violates the basic constitutional principle that the Government may not discriminate in favor of adherents of organized religions and against nonbelievers. Sisson's repugnance to being forced to fight and kill is, as the District Court found, as deeply founded and as sincere as that of any church member. Yet the Act excludes from the pool of men subject to conscription only ". . . any person . . . who, *by reason of religious training and belief*, is conscientiously opposed . . ." 50 U.S.C. App. § 456(j). (Emphasis added.) Undoubtedly, the Act ". . . influence[s] a person . . . to profess a belief" in religion, however broadly the word "religion" may be defined, since it releases the "religious" conscientious objector from obligatory military service, and thereby the Act fosters an establishment of religion. *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 15-16; *Torcaso v. Watkins*, 367 U.S. 488, 492-495.

Even if Sisson's beliefs could be classified as "religious" by extending the rationale of *United States v. Seeger*, 380 U.S. 163, the Act would remain invalid because it favors "pacifist" religions in specifying that the statutory deferment from military service is available only to conscientious objectors who oppose "war in any form," 50 U.S.C. App. § 456(j), a phrase which has been interpreted to mean "opposition to all wars" in decisions cited with approval by the Government (Jurisdictional Statement, p. 12). The Act thus discriminates against religions which espouse a so-called "just war" doctrine.

Indeed, there is evidence that the Act, as written, is intended to discriminate even among "pacifist" religions: a clause which was construed by this Court in *United States v. Seeger*, *supra*, was eliminated from the Act in 1967 with the apparent purpose ". . . to more narrowly construe the basis for classifying registrants as 'conscientious objectors.'" 1967 U.S. Code Cong. & Ad. News, pp. 1333-1334.



In short, the Act (1) tends to establish religion, (2) tends to establish pacifist religions, and (3) tends to establish some pacifist religions, but not others. Whether the statutory deferment of a special breed of conscientious objectors be viewed as the conferring of a public "benefit," *Sherbert v. Verner*, 374 U.S. 398, 404, or as an exemption from a public "duty," *Speiser v. Randall*, 357 U.S. 513, 518, 526, the Act is invalid. Nor can it be saved by invoking the thoroughly discredited theory that the Government can discriminate in awarding "privileges"—see, e.g., Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

The Government's confession that the Act is infirm, but that the infirmities are critical to "a manageable, tangible test susceptible of administrative and judicial application" (Jurisdictional Statement, p. 15), hardly demonstrates the sort of compelling interest needed to justify governmental interference with First Amendment rights. Distinguishing sincere nonreligious objectors from malingerers is no more difficult than doing the same thing for religious claimants of exemption. If anything, the sincerity of a non-religious claimant is the easier to test since he cannot take shelter behind the phraseology of his church's doctrines. Unless mere formal membership in a church opposing all war is to entitle one to exemption—which no one has ever asserted—the administrative advantage supposed to inhere in discrimination against the nonreligious is simply nonexistent, and surely far from overwhelming.

Indeed, the administration of the Act, far from justifying it, necessarily aggravates its constitutional flaws. That administration is riddled with inexpertise, arbitrariness, and procedural flaws. See *White, Processing Conscientious Objector Claims: A Constitutional Inquiry*, 56 Calif. L. Rev. 652 (1968). Beyond this, even the best of all pro-

cedural mechanisms would founder before the impossible task imposed by the statute: how can Sisson's claim of "conscience" be compared with "religious training and belief" on the one hand, but divorced from "philosophical views" or a "personal moral code" on the other? 50 U.S.C. App. § 456(j). By prescribing such a distinction, furthermore, the Act invites semantic argument and compels arbitrariness in decision-making.

In brief, the Act not only encourages the establishment of religion on its face, but the vagueness of its standards makes hopeless any attempt at rational, consistent application of its provisions and hence aggravates the religious discrimination forbidden by the First Amendment.

**2. CONGRESS HAS NO POWER TO CONSCRIPT A CONSCIENTIOUS OBJECTOR, AND IN PARTICULAR, CONGRESS HAS NO POWER TO COMPEL MILITARY SERVICE IN AN UNDECLARED WAR OVERSEAS.**

The District Court held that Congress has no power to draft conscientious objectors for combat duty in a distant conflict without a declaration of war. 297 F. Supp. at 907-911. According to the Government, Congress has an unlimited power to conscript anyone, at any time, for military service anywhere; Congress may choose to draft some persons, but not others, and there can be no judicial review either of the occasion for the exercise of the power, or its scope, or the manner in which it is exercised. (Jurisdictional Statement, pp. 11-13.)

There is no need to labor appellant's refusal to admit the necessity of accommodating the congressional power to raise armies with the individual's constitutional rights, such as the right to be a "conscientious objector." It was precisely the fear of arguments for the expediency of un-

bridled legislative and executive power which prompted the adoption of the Bill of Rights: the first eight amendments in terms limit the power of the federal government, while the ninth and tenth amendments reemphasize the fundamental principle that Congress and the Executive can exercise only powers delegated to them by the Constitution. The First Amendment, in question here, is directed squarely at "Congress."

In light of the constitutional scheme, the need for judicial review in this area is manifest. *United States v. Robel*, 389 U.S. 258, 263-264; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587, 603, 646. The importance of the individual in that scheme has been expressed as follows:

"... the principal distinction between the free world and the Marxist nations is traceable to democracy's concern for the rights of the individual citizen, as opposed to the collective mass of society. And this dedication to the freedom of the individual, of which our Bill of Rights is the most eloquent expression, is in large measure the result of the nation's religious heritage."

*United States v. Seeger*, 326 F. 2d 846, 854-855 (2d Cir. 1964), aff'd 380 U.S. 163.

This Court has a constitutional mandate to protect the full measure of individual human rights belonging to Sisson against encroachment by the assertion of governmental power inconsistent with such rights.

Sisson's position, rejected by the District Court, is that the Constitution absolutely prohibits military conscription of conscientious objectors, so that the judicial inquiry ends when an individual is determined to be a conscientious objector. This right of conscience is traceable

to James Madison, and through him to both the First and Ninth Amendments. I Annals of Congress, 434; Brant, Madison: On the Separation of Church and State, William & Mary Quarterly, Series III, vol. 8, 1951. Sisson does not assert a general right of unlimited scope to follow the dictates of his conscience, *see, e.g., McGowan v. Maryland*, 366 U.S. 420, 437, 440, but rather a limited right of conscience in the context of objection to war. And if Chief Justice Stone was correct in admonishing: "... both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to [this] view ..." (The Conscientious Objector, 21 Columbia University Quarterly, No. 4, October 1919, pp. 268-269), then it necessarily follows that the right to be a conscientious objector is a "fundamental" right with deep roots in the "traditions and [collective] conscience of our people," and protected by the Ninth Amendment. *Griswold v. Connecticut*, 381 U.S. 479, 493 (concurring opinion of Mr. Justice Goldberg joined by the former Chief Justice and by Mr. Justice Brennan).<sup>\*</sup> A Ninth Amendment base for this right may be especially appropriate since it would avoid any arguable difficulty in equating acts of conscience with traditionally religious acts in all circumstances. As Mr. Justice Stone observed, affirmatively forcing action against conscience is particularly offensive to our traditions:

"... there ... is a very radical distinction between compelling a citizen to refrain from acts which he regards as moral but which ... the law regard[s] immoral ... and compelling him to do affirmative acts which he regards as unconscientious and immoral."

*Op. cit.*

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<sup>\*</sup>This case, unlike *Griswold*, of course does not involve the problem of "incorporation" of the Ninth Amendment in the Fourteenth; only federal action is in question here.

This distinction finds considerable support in *Clark*, Judicial Process and the Free Exercise of Religion, to be published in the December, 1969, issue of the Harvard Law Review, the proofs of which will be provided to this Court when available; see *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642.

The District Court rejected Sisson's claim of absolute right, whether based on the First or on the Ninth Amendment, and found instead a qualified right to be a conscientious objector in the free exercise clause of the First Amendment. This right, according to the District Court, may be exercised by Sisson to object only to combatant duty and only in the absence of a declared war or an invasion of the country. That is, the District Court held that in declared wars or invasions, Congress would have the power to conscript all men, including conscientious objectors. The District Court held, however, that Congress had no power to conscript Sisson (a conscientious objector) to kill in Vietnam.

The Government suggests, Jurisdictional Statement, p. 11, n. 8, that Sisson has no standing to attack the constitutionality of his induction because he would not necessarily have been sent to fight in the war to which he conscientiously objected. The District Court, however, not merely held that Sisson had standing to raise this issue, but allowed him—so far as standing was concerned—to attack the legality of the war itself. 294 F. Supp. 511, 512-513. The Government seems to concede that the District Court was right in observing that a soldier cannot challenge his transfer to Vietnam, either in military or in civilian courts; but the Government is unwilling to accept the logic of the District Court's reasoning that if there is to be effective review of the Army's right to compel service in Vietnam, then such review must come at the point of in-



duction, before the civilian turns soldier. Instead, the Government attempts to circumvent this logic by asserting that it "... has little bearing on the crucial issue here. . . ." (Jurisdictional Statement, n. 8). As the Government would have it, Sisson does not have a "sufficiently direct interest" unless he is under orders transferring him to Vietnam, despite the fact that at such time Sisson would be barred by "other considerations," *id.*, from obtaining judicial review of such orders. The argument is based on the possibility that Sisson will not be ordered to the Vietnam theater. But that argument ignores the substantial possibility that Sisson *will* be shipped to Vietnam and that possibility, coupled with the impossibility of obtaining judicial review if it materializes, surely endows Sisson with a sufficient "personal stake" in the issue, within the meaning of that phrase as repeatedly used by this Court:

"The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?' *Baker v. Carr*, 369 U.S. 186, 204."

*Flast v. Cohen*, 392 U.S. 83, 99. Indeed, the prison term which menaces Sisson in itself goes far towards inducing the "concrete adverseness" referred to by the Court. Also, the disruptive effects of conscientious refusals to serve on the conduct of the armed forces will obviously be far greater if that refusal is postponed to the moment when an actual order to fight is given. The system prescribed by Congress avoids such disruption; the inductee is given one chance—his last chance—to refuse service, or to step forward and take a definitive oath of obedience. At this moment, the

moment foreseen by Congress for judicial review, *see* 50 U.S.C. App. § 460(b)(3), Sisson asserted what he claims to be his constitutional right not to be drafted for service in an undeclared, foreign war, against the dictates of his conscience. If that right is to be preserved, the military cannot be allowed to defer its exercise to a time when judicial review is impossible.

Thus, while Sisson clearly has standing to ask for an adjudication of the legality of the Government's participation in the Vietnam war, such "standing" in the technical sense is not essential to support the decision of the District Court. For if the qualified "right" acknowledged by the District Court is to be preserved, then the right must be exercised prior to induction—afterwards, he could be shipped to Vietnam, and the right would be forever lost.

The District Court's decision should therefore be affirmed, whether the right to be a conscientious objector is absolute or qualified.

### 3. CONGRESS HAS NO CONSTITUTIONAL POWER TO COMPEL MILITARY SERVICE IN VIETNAM WITHOUT A DECLARATION OF WAR.

The District Court rejected Sisson's contention that Congress has no power to authorize conscription in time of peace and, in particular, that Congress has no power to authorize compulsory military service in armed international conflict overseas in the absence of a declaration of war. The existence of this power is an open question. *Hamilton v. Regents of the University of California*, 293 U.S. 245, 265; *Mora v. McNamara*, 389 U.S. 934-937; *Holmes v. United States*, 391 U.S. 936, 938-949; *Hart v. United States*, 391 U.S. 956; *McArthur v. Clifford*, 393 U.S. 1002. While the reluctance of this Court to resolve this delicate

question is readily understandable, the question can no longer be avoided without seriously undermining the fundamental principle that ours is a government of laws and not of men. Judicial silence in the face of governmental acts widely believed to be lawless is certain to destroy respect for our legal institutions and thereby to destroy the values whose preservation has been entrusted to Congress and the Executive.

And once confronted, the question has but one answer. The historical record is not susceptible of two interpretations. Indeed, that record raises the gravest of doubts about the power of Congress to conscript at any time (the decision in the *Selective Draft Law Cases*, 245 U.S. 366, notwithstanding). This is shown by Alexander Hamilton's discourses in *The Federalist*; by the deliberations in the Constitutional Convention of 1787; by the deliberations of the First Congress on the subject of the Second Amendment; by the proposals, declarations and debates of the state constitutional ratification conventions; by the writings of Thomas Jefferson, Henry Knox and George Washington; by the history of the "draft bill" of 1814; and by the history of the Civil War Draft Act, among other sources. Adams, *Life and Writings of John Adams*, Vol. IX, Boston (1854), p. 465; *Annals of the Congress of the United States*, vol. I, pp. 434, 749-750, 767; vol. II, pp. 1076, 2067 ff., 2101; vol. XXVIII, pp. 70 ff., 79-80; Bernstein, "Conscription and the Constitution: the Amazing Case of *Kneedler v. Lane*," 53 *A.B.A.J.* 708 (1967); Black, "The Selective Draft Law Cases," XI *Bos. L. Rev.* 37 (1937); *Conscience in America*, E. P. Dutton & Co., N.Y. (1968), pp. 49-54, 64-71; Corwin, *The Constitution and What It Means Today*, Atheneum, N.Y. (1965), p. 71; Elliot's *Debates*, J. B. Lippincott Co., Philadelphia (1891), vol. II, p. 552, vol. III, pp. 425-426; *Life and Writings of Thomas Jefferson*, Mod.

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Nor can it be maintained that peacetime conscription is a power "necessary and proper" to wage an undeclared war, for the draft is wasteful and unnecessary, 109 Cong. Rec. 3413-3417; 110 Cong. Rec. 8575-8576, 8578-8580, 8586-8587, 15365-15371; "Review of the Administration and Operation of the Selective Service System," Hearings before the Committee on Armed Services, House of Representatives, 89th Congress, Second Session, June 28 and 29, 1966, 9756-9761, 9872-9880. Indeed, a former Assistant Secretary of Defense testified at the above-mentioned hearings on June 30, 1966, that the added cost of an all-volunteer army would range from 5 to 9 billion dollars. Even accepting that figure (and rejecting the evidence that elimination of the draft would reduce, instead of increase, the cost of maintaining our armed forces), there cannot be said to exist the sort of "clear and present danger" to render

"necessary and proper" the draft which, by definition, deprives the conscript of his liberty and significantly enhances the risk to his life: if a sufficiently clear and present danger existed, either Congress could declare war or Congress could raise the revenues necessary for an all-volunteer army through additional taxes.

It is entirely proper, of course, for this Court to inquire into the sufficiency of so-called "legislative facts" to support a congressional finding of necessity. *Smith v. California*, 361 U.S. 147, 165, 172; *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U.S. 194, 209-210; *Whitney v. California*, 274 U.S. 357; Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 Pa. L. Rev. 637, 648 (1966).

Any deference normally due to the judgment of the Congress—or rather of the president, who has chosen to exercise the discretion vested in him by 50 U.S.C. App. § 454(a)—is irrelevant here because that judgment does not rest upon proper considerations of military needs. The truth about the draft appears in the following excerpts from the "Channeling" memorandum issued by the Selective Service System on July 1, 1965, Gov. Print. Off. 899-125:

"One of the major products of the Selective Service classification process is the channeling of manpower into many endeavors, occupations, and activities that are in the national interest. . . .

"The opportunity to enhance the national well being by inducing more registrants to participate in fields which relate directly to the national interest came about as a consequence, soon after the close of the Korean episode, of the knowledge within the System that there was enough registrant personnel to allow stringent deferment practices employed during war time to be relaxed or tightened as the situation might



require. Circumstances had become favorable to induce registrants, by the attraction of deferment, to matriculate in schools and pursue subjects in which there was beginning to be a national shortage of personnel. These were particularly in the engineering, scientific and teaching professions. . . .

"In the Selective Service System the term 'deferment' has been used millions of times to describe the method and means used to attract to the kind of service considered to be most important, the individuals who were not compelled to do it. The club of induction has been used to drive out of areas considered to be less important to the areas of greater importance in which deferments were given, the individuals who did not or could not participate in activities which were considered to be essential to the defense of the Nation. The Selective Service System anticipates further evolution in this area. . . .

"Since occupational deferments are granted for no more than one year at a time, a process of periodically receiving current information and repeated review assures that every deferred registrant continues to contribute to the overall national good. . . .

"In the less patriotic and more selfish individual it engenders a sense of fear, uncertainty, and dissatisfaction which motivates him, nevertheless, in the same direction. He complains of the uncertainty which he must endure; he would like to be able to do as he pleases; he would appreciate a certain future with no prospect of military service or civilian contribution, but he complies with the needs of the national health, safety, or interest—or is denied deferment.

"Throughout his career as a student, the pressure—the threat of loss of deferment—continues. It continues with equal intensity after graduation. . . .

"The device of pressurized guidance, or channeling, is employed on Standby Reservists. . . .

"If he attempts to enlist at 17 or 18 and is rejected, then he receives none of the impulsion the System is capable of giving him. If he . . . is not rejected until . . . age 23, he has felt some of the pressure but thereafter is a free agent.

"This contributed to the establishment of a new classification of 1-Y (registrant qualified for military service only in time of war or national emergency). This classification reminds the registrant of his ultimate qualification to serve and preserves some of the benefit of what we call channeling. . . .

"From the individual's viewpoint, he is standing in a room which has been made uncomfortably warm. Several doors are open, but they all lead to various forms of recognized, patriotic service to the Nation. Some accept the alternative gladly—some with reluctance. The consequence is approximately the same.

...  
 "Delivery of manpower for induction, the process of providing a few thousand men with transportation to a reception center, is not much of an administrative or financial challenge. It is in dealing with the other millions of registrants that the System is heavily occupied, developing more effective human beings in the national interest."

Such a blatantly undemocratic "System" can be sanctioned under the constitutional power to "raise armies" only if our entire population is seen as an "army," our nation as an armed camp, our people as so much war materiel to be marshalled in the "national interest." One may wonder whether the current crisis of unrest in our schools;

on our campuses, and in urban areas, can be attributed to the frustrations built up among people, young and old, by the unnatural pressures of a system bent on the metamorphosis of Athens into Sparta.

To sum up, there is no power to conscript in peace time, peacetime conscription is not necessary, and in any event the function of the Act is the constitutionally impermissible one of mobilizing a civilian army rather than procuring manpower for the military.

4. THE DISTRICT COURT HAS NO JURISDICTION OVER SISSON'S PROSECUTION IF THE ISSUE OF LEGALITY OF THE GOVERNMENT'S PARTICIPATION IN THE VIETNAM WAR IS A POLITICAL QUESTION.

The District Court held that while Sisson had standing to challenge the legality of the Vietnam conflict, the question of legality under the Constitution and relevant principles of international law is a "political" question, whose determination is entrusted by the Constitution to the coordinate political branches, and therefore not justiciable. The District Court then rejected Sisson's argument that the Court's political question ruling has the effect of depriving him of one or more valid defenses, that the court has no jurisdiction under Article III of the Constitution over criminal cases in which valid constitutional defenses are barred as involving political issues and, consequently, that his prosecution violates due process. Briefly stated, Sisson maintains that, axiomatically, Congress has no power to raise armies to fight an illegal, undeclared war and the Act, if construed to authorize the order conscripting Sisson, is unconstitutional as applied because the Government's military participation in the Vietnam conflict violates international law and the constitutional require-

ment of a declaration of war. Sisson is entitled to his defense:

"There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal."

Mr. Justice Murphy concurring in *Estep v. United States*, 327 U.S. 114, 131.

Commenting on the *Estep* decision, the late Professor Henry M. Hart, Jr., said:

"Three Justices of the Supreme Court of the United States were willing to assume that Congress has power under Article I of the Constitution to direct courts created under Article III to employ the judicial power conferred by Article III to convict a man of a crime and send him to jail without his ever having had a chance to make his defenses. No decision in 164 years of constitutional history, so far as I know, had ever before sanctioned such a thing. Certainly no such decision was cited." (Footnote omitted.)

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1382 (1953).

Three alternatives are available: (1) if the legality of the war is a political question, the District Court has no jurisdiction over this criminal prosecution; (2) if the legality of the war is not a political question (see the questions posed by Mr. Justice Douglas dissenting in *Mitchell v. United States*, 386 U.S. 972, 973-974, and by Mr. Justice Stewart in *Mora v. McNamara*, 389 U.S. 934) then the case probably must be remanded to the District Court for

determinations of fact—such as the facts set forth in Falk, Vietnam and International Law (O'Hare Books, 1967), and In The Name of America (E. P. Dutton & Co., Inc.); (3) adjudicating the legality of the war may be unnecessary if Sisson's belief in the war's illegality (a reasonable belief, as the District Court found) is a complete defense to the charge against him, i.e., if specific intent is an element of the offense, and its existence is negated by a reasonably held belief that the war is illegal. Cf. The William Gray, 29 Fed. Cas. 1300, No. 17,694 (C.C. N.Y. 1810).

In the context of Article 6(a) and Article 8 of the Treaty of London, August 8, 1945, 59 Stat. 1544, which impose "individual responsibility" for determining the legality of a war, any of the above three alternative dispositions would satisfy the minimum requirements of justice, but perhaps the most appropriate is the third one: if the individual must bear responsibility, what more can be required than that he be reasonable?

### Conclusion.

For the foregoing reasons, appellee respectfully submits that this Court should affirm the judgment of the District Court arresting his judgment of conviction.

JOHN G. S. FLYM.

August, 1969.



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# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 305

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN HEFFRON SISSON, JR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

## OPINION BELOW

The opinion of the United States District Court for the District of Massachusetts (A. 248-264) is reported at 297 F. Supp. 902.

## JURISDICTION

On April 1, 1969, the district court entered an order granting appellee's motion in arrest of judgment, on the ground that the criminal statute in question (50 U.S.C. App. 462), which makes it a crime, *inter alia*, to refuse to submit to induction as ordered, could not constitutionally be applied to appellee. A notice of appeal to this Court was filed in the district court on April 23, 1969. On October 13, 1969, this Court entered



an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (A. 268). Under 18 U.S.C. 3731, this Court has jurisdiction, on direct appeal, to review a decision granting a motion in arrest of judgment based upon the invalidity of the statute on which the indictment is founded. See *United States v. Green*, 350 U.S. 415, and the discussion *infra*, pp. 29-36.<sup>1</sup>

#### QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over the instant direct appeal.

2. Whether the Selective Service laws may constitutionally be applied to require induction into the Armed Forces of one who is a non-religious conscientious objector to participation in the Vietnam conflict.

#### STATUTES INVOLVED

Section 12(a) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 462(a)) provides, in pertinent part:

Any \* \* \* person \* \* \* who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under \* \* \* this title \* \* \*, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for

<sup>1</sup> In its order postponing consideration of the jurisdictional question, the Court requested the parties to discuss "not only the issue of jurisdiction under the 'arresting a judgment' subdivision of 18 U.S.C. § 3731, but also the questions of whether jurisdiction exists under either the 'motion in bar' subdivision or the 'decision \* \* \* setting aside or dismissing' subdivision of 18 U.S.C. § 3731 (A. 268).

not more than five years or a fine of not more than \$10,000, or by both \* \* \*.

Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 456(j)) provides, in pertinent part:

Nothing contained in this title \* \* \* shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. \* \* \*

#### STATEMENT

An indictment returned in the United States District Court for the District of Massachusetts charged that appellee knowingly and wilfully refused to comply with the order of his local Selective Service board to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462 (A. 6).

Prior to trial appellee moved to dismiss the indictment, principally on the ground that there was no constitutional authority to conscript him to serve in an undeclared war. He also contended that the hostilities in Vietnam violated international law and alleged, as a proposed defense, that he reasonably believed the Vietnam conflict to be illegal (A. 10; see A. 30-38). In an affidavit in support of his motion to dismiss, appellee stated that, at the time he refused to submit to induction and at the time of the motion

he believed, on the basis of his knowledge of the Vietnam conflict, that he could not participate in it without doing violence to the dictates of his conscience (A. 43).

In a written opinion (A. 80-86; 294 F. Supp. 511) which was later amplified (A. 87-89; 294 F. Supp. 515), the district court determined that appellee had the requisite standing to raise these issues, but that it had no jurisdiction to decide the "political questions" whether a congressional declaration of war was necessary to the constitutional validity of American military activities in Vietnam and whether the conduct of the Vietnam hostilities violated international law. The court also ruled that it would not constitute a defense to the charge of intentional refusal to submit to induction that appellee personally regarded the Vietnam conflict as illegal or unjust.

After a trial at which appellee testified, the jury returned a verdict of guilty. Appellee made a motion in arrest of judgment (A. 241-243), which was subsequently amended (A. 244-247), in which he reasserted the grounds of his earlier motion to dismiss.<sup>2</sup> In his motion in arrest appellee stated that he "cannot qualify as a 'conscientious objector' within the meaning of the Military Selective Service Act of 1967, because he is not a pacifist and, in any event, his convictions that the Vietnam war is illegal, immoral and unjust are not based on 'religious training and belief' " (A. 242, 245).

<sup>2</sup> He also claimed that if the court could not adjudge the relevant issue of the legality of the Vietnam conflict, then the trial violated due process (A. 245).

The district court, in granting the motion (A. 248-264), noted that "in substance the case arises upon an agreed statement of facts" (A. 250). It took as the predicate for its opinion that it was undisputed that appellee was sincerely and conscientiously opposed to the Vietnam conflict, based on his moral convictions, educational training, extensive reading of reports about and comments on the Vietnam situation, and the degree to which he had familiarized himself with the U.N. Charter, the charter and judgments of the Nuremberg Tribunal, and other domestic and international matters bearing upon the American involvement (A. 251). The court reiterated its prior rulings that appellee had standing to challenge the indictment on the grounds advanced although he had filed no conscientious objector claim with the Selective Service System (A. 249), but that the court had no jurisdiction to decide the political questions whether the military actions of the United States in Vietnam require a declaration of war by Congress or violate international law (*ibid.*).

The court assumed *arguendo* that a conscientious objector, religious or otherwise, may constitutionally be conscripted for some kind of military service in peace or war, and that all persons, including conscientious objectors, could constitutionally be conscripted even for combat service "in time of declared war or in the defense of the homeland against invasion" (A. 256-257). It held, however, that since appellee was sincere and his conscientious objection to participation in the Vietnam conflict was not unreasonable, he

had a valid claim to be "constitutionally exempted from combat service in the Vietnam type of situation" (A. 259). It was of the view that the magnitude of appellee's conviction had to be balanced against the need of the government to have persons in appellee's circumstances engage in combat service in Vietnam. Finding that there was not a "national need for combat service from [appellee] as distinguished from other forms of service by him" (A. 258), the court concluded that the Military Selective Service Act of 1967, as applied to appellee, violated the Free Exercise and Due Process Clauses of the First and Fifth Amendments, respectively, insofar as it sought to require him to be inducted upon the possibility of serving in a combatant capacity in a foreign war to which he was a conscientious (but not religious) objector (A. 261). Alternatively, the court held that Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 456(j)), as applied to appellee, violated the Establishment Clause of the First Amendment, in that it unreasonably discriminates between religious and non-religious conscientious objectors (A. 263).<sup>3</sup>

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<sup>3</sup> The court, in characterizing this claim as merely a reiteration of appellee's "older contention" (A. 248-249), apparently accepted his position that the Establishment Clause argument was implicit in the original motion to dismiss the indictment, in view of his assertion in connection therewith of a "right of conscience." In referring to appellee as a "conscientious objector" rather than a "selective conscientious objector," the court apparently relied on its finding that a selective conscientious objector has a claim of a magnitude that "is not appreciably lessened if his belief relates not to war in general, but to a particular war" (A. 258).



Accordingly, the court granted appellee's motion in arrest of judgment (A. 264).

#### SUMMARY OF ARGUMENT

##### I.

In its order postponing jurisdiction, the Court directed the parties, in relation to the appealability question in this case, to discuss all the various branches of the Criminal Appeals Act by which appeals may be taken directly to this Court. We have concluded that an appeal is not authorized under either the "motion in bar" or "decision \* \* \* dismissing" provisions of the Act, since the ruling in this case was made after jeopardy had attached. The language, legislative history and consistent construction of the Criminal Appeals Act since 1907 indicate that Congress did not intend to give the United States a right of appeal to this Court from decisions—other than on a motion in arrest of judgment—rendered after jeopardy has attached, in the sense that a jury had been sworn to try the case.

It is, however, our position that this case is appealable to this Court under the "motion in arrest" language of 18 U.S.C. 3731. Appellee's motion, which the trial judge granted, purported to be and was treated by the district court as a motion in arrest of judgment. It was submitted, in accordance with the time spelled out in Rule 34, F.R.Crim.P., for the making of such motions, after the jury's verdict of guilty. The ground on which the motion rested—that the indictment did not charge an offense—similarly fell within the tradi-

tional scope of such motions, as expressly recognized in Rule 34, F.R.Crim.P.

The sole basis for question as to whether the present holding comes within the "motion in arrest" provision of the statute is that the trial judge utilized, as part of the circumstantial predicate for his legal rulings, the undisputed fact, which did not appear in the indictment, that appellee is a selective, non-religious conscientious objector <sup>to</sup> in the Vietnam conflict. In our view this use of facts, not as an independent ground of decision but only to provide the framework for the trial court's legal rulings on the sufficiency of the indictment, did not remove the instant decision from the class of appealable decisions rendered on a motion in arrest of judgment. This Court has recognized that a stipulation of facts by the parties in a criminal case may be treated, like a bill of particulars, as supplementing the indictment, so that a ruling based on those facts is appealable to this Court where the basis of the decision is the invalidity or construction of the underlying statute. That principle is applicable here. Moreover, each aspect of the court's dual holding in this case—that 50 U.S.C. App. 462(a) cannot be applied, under the Free Exercise and Due Process Clauses, to require military service of one like appellee who is a conscientious objector to the Vietnam conflict and that 50 U.S.C. App. 456(j), the conscientious objector provision, constitutes an establishment of religion—meets the requirements of the Criminal Appeals Act for appeal to this Court—*viz.*, that the decision be "based upon the invalidity or construction of the statute upon which the indictment is founded." It follows that this Court has jurisdiction over the appeal.

## II

Appellee, a non-religious and sincere objector to participation in the Vietnam conflict, refused to report for induction into the Armed Forces as ordered, and was subsequently prosecuted for violation of that order. The district court found that there was a substantial possibility that he would be sent to fight in Vietnam. Then, striking a balance between appellee's right to individual liberty and the court's appraisal of need for combat service from persons like appellee in "a campaign fought with limited forces for limited objects with no likelihood of a battlefield within this country and without a declaration of war," the court afforded appellee a constitutional immunity from conscription generally at a time when he might be sent to Vietnam (A. 258).

1. Since appellee's induction would not necessarily have resulted in his ever being sent to Vietnam, the district court acted prematurely in deciding the case on a set of circumstances which may never occur. In deciding a constitutional issue on anticipated events, the district court violated well established rules that a court should not anticipate questions in advance of the necessity to decide them, nor formulate a rule of constitutional law broader than that necessitated by the precise facts of the case before the court.

2. The district court exceeded the limits of judicial power in undertaking a "balancing approach" to limit the exercise of the plenary congressional power to raise and support armies. While Congress may not act arbitrarily in determining who shall serve in the

Armed Forces, the right to determine whether this country needs men for military service is vested in Congress, not the courts. It is not within the province of the courts to determine whether a particular foreign policy is wise or unwise or whether or not there is sufficient national need for a particular number of men to be in a certain place at a specific time. This determination is the very essence of a "political question," and is thus unsuited for judicial scrutiny. The courts should not substitute their own determination of the national need for military manpower for the determination made by the coordinate branches of government charged under the Constitution with the responsibility for making and implementing that decision.

3. Although the district court held that to prefer religious conscientious objectors over non-religious objectors violated the Establishment clause of the First Amendment, that constitutional provision is not actually involved. So far as the "selective" conscientious objector is concerned, Congress has made no distinction between religious and non-religious motivations. A person who seeks exemption based on a belief that a particular war is wrong is denied the exemption whether his belief is religiously or non-religiously founded. Since Congress treats religious and non-religious selective conscientious objectors equally, and no preference is afforded to the religious, "selective" conscientious objector, no claim under the Establishment Clause can properly be made here.

Nor can it reasonably be argued that, by requiring appellee's induction into the Armed Forces, Congress

has violated the Free Exercise Clause of the First Amendment. Freedom to believe does not justify disobedience to a valid law, and the Free Exercise Clause does not mandate that a conscientious objector be immune from conscription. There is no precedent for construing the Free Exercise Clause as embracing a general right of conscience unrelated to religious underpinnings. To so construe that provision would logically lead to a situation destructive of orderly government, since it would have application in a wide variety of circumstances, not just in regard to conscription.

4. Since no First Amendment issue is presented by this case, the sole issue to be decided is whether Congress has acted arbitrarily in granting exemption from combat duty to those who oppose all wars and denying exemption to those who wish to reserve the right to select the wars in which they will fight. There is a rational basis to grant an exemption to the former while denying exemption to the latter. Opposition to only a particular war necessarily involves a political judgment as to the propriety of governmental action in a particular place at a particular time. Congress may validly conclude that there is a qualitative difference between this type of belief and the attitude of a person who believes it is wrong to kill for any purpose at any time.

### III

The issue as to whether Congress has "established" religion by granting exemption to religious "pacifist" objectors, while denying it to non-religious "pacifist"



objectors, is not presented on the facts here. That issue is before this Court in *Welsh v. United States*, No. 76, this Term. Assuming, *arguendo*, that the petitioner there prevails, such a decision would nevertheless not control the result in this case. To hold otherwise would be to violate the well established rule that an individual cannot attack a statute on the ground that it might be unconstitutional as applied to others.

#### ARGUMENT

##### I. THIS COURT HAS JURISDICTION OF THE APPEAL

In its order of October 13, 1969, the Court stated:

Further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits. \* \* \* In addition to the questions presented on the merits, counsel are requested to discuss in their briefs and oral arguments, not only the issue of jurisdiction under the "arresting a judgment" subdivision of 18 U.S.C. § 3731, but also the questions of whether jurisdiction exists under either the "motion in bar" subdivision or the "decision \* \* \* setting aside or dismissing" subdivision of 18 U.S.C. § 3731.

In substance, we adhere to the position taken in our Jurisdictional Statement (and concurred in by appellee) that jurisdiction over the instant appeal properly lies to this Court under the "arresting a judgment" provision of 18 U.S.C. 3731. With respect to the "motion in bar" and "decision \* \* \* setting aside or dismissing" subdivisions of the statute, it is our view that jurisdiction in this Court does not exist,

since the language of the statute, its legislative history and long-standing construction indicate that Congress did not afford the government a right to appeal to this Court from rulings—other than those granting motions in arrest of judgment—rendered after jeopardy has attached, even though to do so would not violate the Double Jeopardy Clause of the Fifth Amendment to the Constitution.

The Criminal Appeals Act, 18 U.S.C. 3731, provides in pertinent part:

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

These provisions have come down unchanged in substance from the original Criminal Appeals Act en-

acted on March 2, 1907 (34 Stat. 1246). That statute provided:

\* \* \* That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The Act was amended in 1928 so as to abolish review by writ of error and substitute the right of appeal (45 Stat. 54). In 1942 the Act was further amended to enable the United States to appeal to the courts of appeals from certain types of dismissals or rulings on motions in arrest of judgment, not here pertinent except as discussed below. See generally *United States v. Apex Distributing Co.*, 270 F. 2d 747 (C.A. 9). In addition, the 1942 amendment increased the appellate jurisdiction of the Supreme Court by including cases involving informations as well as indictments (56 Stat. 271). The present form of the Act is the result of

a 1948-amendment which changed the wording to conform to Rule 12 of the Federal Rules of Criminal Procedure (as promulgated in 1946),<sup>4</sup> but did not alter the scope of review (62 Stat. 844; see Reviser's Note to 18 U.S.C. 3731).

Thus, the provisions of the 1907 Act and its legislative history are the crucial focus for any inquiry as to the scope of the right of appeal to this Court which Congress intended to confer upon the United States under the current Criminal Appeals Act. This, to a considerable extent, is the cause of the technical problems which plague the interpretation of the statute. The statute was passed at a time when the range of federal prosecutions was considerably narrower and the technical niceties of pleading were accorded more significance than at present. In particular, as recent experience in Selective Service cases illustrates, the necessity of review of administrative records in connection with a criminal prosecution—an outgrowth of the tremendous expansion of administrative agencies since 1907—gives rise to situations which do not readily fit into the categories of pleadings recognized at the time the Act was first passed. Nevertheless, until such time as Congress decides to amend that statute,<sup>5</sup> the Act as passed in 1907 defines the limitations of the

<sup>4</sup> Thus, for example, the phrase "motion in bar" was substituted for the common law expression "special plea in bar."

<sup>5</sup> From time to time the Department of Justice has suggested legislation to amend the Criminal Appeals Act so as to eliminate the various gaps—which we believe to be unwarranted as a matter of policy—in the right of the United States to take appeals in criminal cases, particularly with reference to post-jeopardy rulings not going to issues of fact. A pending bill to allow the government to appeal from any ruling by a district

government's right to appeal to this Court, and the government and the Court must perforce function within those limitations.

The problems that arise under the statute are of two kinds: (1) the nature of the decision of the district court from which appeal is sought—i.e., whether it is within the class of cases in which appeal has been authorized (e.g., demurrer, plea in bar, and arrest of judgment); and (2) whether the decision was rendered at a time, in relation to jeopardy of the defendant, when appeal has been sanctioned. We discuss the second question first because, in our view, the answer to that question precludes the government from relying upon anything other than the motion in arrest of judgment clause as a basis for appeal in the instant case.

*A. Congress, in the Criminal Appeals Act, Apparently Intended to Confine Appeals By the Government, Except as to Motions in Arrest of Judgment, to Situations in which Jeopardy Had Not Attached, Even Though a Defendant Who Moved for Dismissal During Trial Could Constitutionally Be Subject to Retrial.*

1. With respect to judgments granting motions in bar, the statute gives the government a right of ap-  
court terminating or dismissing a prosecution, to the extent permitted by the Constitution, which also would amend the statute to provide that all appeals be taken to the court of appeals save where the sole ground for the termination of a prosecution is the invalidity of the underlying statute, was introduced in the House of Representatives on October 29, 1969, by Representative McCulloch. H.R. 14588, 91st Cong., 1st Sess.; see 115 Cong. Rec. H10274.



peal to this Court "when the defendant has not been put in jeopardy." For most purposes, a defendant is deemed to have been put in jeopardy at the point where the jury is sworn to try him (or an equivalent point is reached in a non-jury case). *E.g.*, *Downum v. United States*, 372 U.S. 734, 737. However, when a defendant secures dismissal of an indictment or succeeds in having a verdict or judgment set aside, the constitutional provision against double jeopardy does not bar a subsequent trial. *United States v. Ball*, 163 U.S. 662; *United States v. Tateo*, 377 U.S. 463, 466-467. The question in this phase of the case is whether "put in jeopardy" should be read literally, or should be interpreted as applying only to circumstances where the defendant cannot be retried without violating the Fifth Amendment's Double Jeopardy Clause.

The Department of Justice has consistently taken the view that the plea in bar section limits the government's right of appeal to the granting of such pleas before a jury has been sworn. Soon after passage of the original Act, the 1907 Report of the Attorney General urged that the omission in the Act of a governmental right to appeal from post-jeopardy rulings be remedied by revising the Act so as to require counsel for the defendant to raise and argue questions of law prior to the time when jeopardy attached. See Rep. Atty. Gen. (1907), p. 4. He said:

By the act approved March 2, 1907 (34 Stat. 1246), an appeal is allowed to the United States in criminal cases, but substantially only as to

the constitutionality or construction of Federal statutes and only when the question is presented, in some form, on a preliminary issue of law. \* \* \*

Recognizing the constitutional obstacles which embarrass the grant of an appeal when the error complained of is committed after jeopardy, I suggest that provision be made for raising compulsorily all questions of law which can be appropriately raised before that moment comes.

In *United States v. Zisblatt*, 172 F. 2d 740 (C.A. 2), the government appealed to the court of appeals from a post-verdict judgment granting a motion to dismiss the indictment as barred by the statute of limitations. The government's theory there was that this was the granting of a motion in arrest of judgment, but was not appealable to the Supreme Court because not based on the construction or invalidity of the underlying statute. The court of appeals held that the district court's ruling was not an arrest of judgment but the granting of a special plea in bar. Recognizing that the Criminal Appeals Act contained language permitting the government to appeal from rulings on special pleas in bar only "when the defendant has not been put in jeopardy," the court acknowledged that there "is, therefore, a good argument for saying that no appeal lies to the Supreme Court" (*United States v. Zisblatt, supra*, 172 F. 2d at 742). Without discussing the legis-

lative history of the statute, the court concluded (*id.* at 742-743):

On the other hand, there is also a more than plausible argument for saying that the Criminal Appeals Act, being a remedial statute, was intended to give an appeal to the prosecution in all cases where that was constitutionally possible; and that the Supreme Court may not read literally the clause, which limits its powers to cases where the defendant had "not been put in jeopardy," but that on the contrary it may think that the clause only meant that it should not intervene when the Constitution forbade intervention.

After determining that the Constitution would not prohibit the government from appealing the district court's ruling, the court of appeals certified the case to this Court. The then Solicitor General, being of the view that the statute barred appeals from the granting of motions in bar after jeopardy had attached, moved to dismiss the appeal, and the appeal was dismissed (336 U.S. 934). The Department of Justice has thereafter adhered to that position, and the government has never sought to appeal in these circumstances.

In the light of the request by the Court for discussion of the various aspects of the Criminal Appeals Act, we have reexamined the legislative history of the 1907 statute. The progress of the bill through Congress is summarized in Frankfurter and Landis, *The Business of the Supreme Court*, pp. 113-119

(1928); see also Friedenthal, *Government Appeals in Federal Criminal Cases*, 12 Stan. L. Rev. 71 (1959).<sup>6</sup>

<sup>6</sup> Frankfurter and Landis (*supra*, pp. 117-119, nn. 67-69, 71) summarizes the legislative history of the 1907 Act as follows: "The bill was introduced into the House by Jenkins on Feb. 22, 1906. 40 CONG. REC. 2881. It was reported from committee on Mar. 7, 1906, by Nevin. *Ibid.* 3494. See HOUSE REPORT, No. 2119, 59th Cong., 1st Sess., Ser. No. 4906. The bill appears in full in 40 CONG. REC. 5408. It provided that the United States should have the same right of review by writ of error in a criminal case as is accorded the defendant, providing, however, that even if there was error, a verdict for the defendant should not be set aside. The bill passed the House on April 17, 1906, without debate and division. *Ibid.* 5408.

"The bill was reported by Nelson from the Senate Judiciary Committee on May 29, 1906. 40 CONG. REC. 7589. The report offered a substitute bill in lieu of the House bill. See SEN. REP., No. 3922, 59th Cong., 1st Sess., Ser. No. 4905. The Senate bill permitted writs of error from the circuit and district courts to the Supreme Court or the circuit courts of appeals (according to the provisions of the Act of 1891) from a decision quashing an indictment, sustaining a demurrer to an indictment or any count thereof, from the arrest of a judgment of conviction on the ground of insufficiency of the indictment, and from a decision sustaining a special plea in bar when the defendant has not been put in jeopardy. On June 1, 190[6], upon objection of Teller of Colorado, the bill was passed over. 40 CONG. REC. 7684. On June 19 an amendment proposed by Nelson prohibiting a verdict for the defendant from being set aside even if there was error, was adopted. *Ibid.* 8695. On June 23 upon Spooner's suggestion, the amendment was reconsidered and disagreed to. *Ibid.* 9033. On the same day further consideration of the bill was prevented by objection. On June 25 upon Mallory's objection, the bill was again passed over, and the session closed without action by the Senate. *Ibid.* 9122.

"In the second session the bill, after being recommitted to the Judiciary Committee, was reported out on Jan. 29, 1907. 41 CONG. REC. 1865; SEN. REP., No. 5650, 59th Cong, 2nd Sess., Ser. No. 5060. The bill was amended by a provision requiring that all objections to the sufficiency of the indictment in matters of form should be made and determined prior to the im-

The critical discussions pertaining to the features of the Act which are at issue in the instant case occurred during the three-day debate in the Senate on the bill

paneling of the jury. 41 CONG. REC. 2190. The bill was debated by the Senate for three days. *Ibid.* 2190-2197, 2744-2763, 2818-2825. Hale of Maine and Whyte of Maryland resisted the bill outright and declared themselves in favor of the 'traditional' provisions of the common law. Whyte's amendment to strike out all the provisions of the bill save that permitting an appeal from a judgment sustaining a demurrer to an indictment was defeated by a vote of 40-14. *Ibid.* 2195. Rayner of Maryland proposed an amendment providing that even if there was error, a verdict or judgment for the defendant should not be set aside. Senator Spooner curtly analyzed the proposal, saying: 'If it means anything it means too much.' *Ibid.* 2761. Consequently the phrase 'or judgment' was withdrawn, and Rayner's amendment with the omission of these destructive words was adopted. *Ibid.* 2819. Carter of Montana succeeded in getting the adoption of an amendment requiring an appeal to be taken within thirty days and diligently prosecuted. *Ibid.* 2194. Newlands of Nevada offered an amendment permitting the defendant to be released on his own recognizance, which Piles of Washington further amended by adding 'in the discretion of the presiding judge.' *Ibid.* 2195. The Piles amendment was adopted by a vote of 29 to 23, and the Newlands amendment by 33 to 21. *Ibid.* 2196, 2197. Upon Spooner's suggestion Nelson secured a reconsideration of the Piles amendment and its rejection. *Ibid.* 2821. Clarke of Arkansas secured the adoption of an amendment restricting appeals from decisions quashing or sustaining a demurrer to an indictment or arresting a judgment of conviction for insufficiency of the indictment to cases involving the validity or construction of the statute upon which the indictment was founded. *Ibid.* 2822. The bill with these amendments is found in full in 41 CONG. REC. 2823. Culberson and Spooner suggested further amendments to the last clause of the bill, which was finally, however, struck out. *Ibid.* 2824, 2825.

\* \* \* \*

"The bill passed the Senate without division on Feb. 13, 1907, and was printed upon Spooner's motion. 41 CONG. REC. 2834. Its reception in the House brought an attack from its original



reported from the Judiciary Committee on January 29, 1907—a bill similar, as to the problems involved here, to that finally passed by the Congress (see 41 Cong. Rec. 2190-2197, 2745-2763, 2818-2825).

So far as the special plea in bar section of the Act is concerned, we think the legislative history is reasonably clear that Congress did not intend for an appeal to be allowed if the ruling was made after a jury had been assembled to try the case. Senator Bacon, in first introducing the measure, indicated that the phrase "when the defendant has not been put in jeopardy" in the "motion in bar" subdivision was placed there "out of an abundance of caution" (41 Cong. Rec. 2191). Senator Patterson, another proponent of the measure, had at one point indicated that he thought there could not be a double jeopardy problem with respect to a plea in bar because "[a] special plea in bar is that which is set up as a special defense notwithstanding the defendant may be guilty of the offenses of which he is charged," and referred specifically to an antitrust case where Chicago packers had been freed on the ground that they had been in-

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sponsors, but a motion to refer it to the Judiciary Committee was adopted. *Ibid.* 3044-3047. On Feb. 22, 1907, the House disagreed to the Senate bill, proposed a conference and named Jenkins, Birdsall, and De Armond as conferees. *Ibid.* 3647. The Senate named Nelson, Knox, Bacon. *Ibid.* 3623. The conference committee, aside from mere formal changes, revised the bill so as to divest the circuit courts of appeals of all review and invest this in the Supreme Court alone. Review was also to be only by writ of error. See HOUSE REPORT, No. 8113, 59th Cong., 2nd Sess., Ser. No. 5065. The report was agreed to by the Senate on Feb. 26 and by the House the following day. 41 Cong. Rec. 3994, 4128."

duced to give information to the government (41 Cong. Rec. 2753). Senator Nelson, a leading spokesman for the measure, was, however, very specific that the proposed measure would not have permitted an appeal in the Chicago case because in that case "a jury was impaneled," and the question whether the defendants were entitled to immunity because they had given the information was submitted to the jury. He then went on to say (41 Cong. Rec. 2757):

A case may occur where a special plea in bar is interposed and the Government does not deny the fact pleaded in the special plea in bar, admits the truth of it, but says in its answer or demurrer to the plea in bar that it constitutes no bar. In that case, where a plea in bar is decided without the intervention of a jury, there has been no jeopardy \* \* \*: We expressly provide in the fourth paragraph that in the case of a special plea in bar where the defendant has been put in jeopardy no appeal lies.

Senator Nelson elsewhere said that in the plea in bar section it was made clear, "out of extreme caution," that "where the defendant has been put in jeopardy he can not be reindicted" (41 Cong. Rec. 2756).

Considering the fact that the right of appeal by the government was an innovation in federal criminal law when the Act was passed, and that the double jeopardy question was of great concern to the senators, we think that it is fair to conclude that Congress intended to avoid possible constitutional problems by permitting an appeal from the grant of a plea in bar only if the issue were determined prior to a jury's being

sworn, and that the provision should be construed accordingly.<sup>7</sup>

2. The clause granting an appeal from a decision on demurrer, based on the unconstitutionality or construction of the statute, does not in express terms contain the phrase "when the defendant has not been put in jeopardy." Nevertheless, since the enactment of the statute, the Department of Justice has thought that it had no right of appeal from the granting of a demurrer after a jury had been sworn. See Report of the Attorney General, *supra*, pp. 17-18. In *United States v. MacDonald*, 207 U.S. 120, decided seven months following the passage of the 1907 Act, in which the constitutionality of the Act was challenged for the first time (in the context of a case arising under the demurrer provision), Justice Holmes, writing for a unanimous court, stated (207 U.S. at 127):

<sup>7</sup> For this reason there is no occasion to reach in this case the question, on which members of this Court have expressed differing views, whether a "motion in bar" includes any judgment "which will end the cause and exculpate the defendant." See *United States v. Mersky*, 361 U.S. 431, 441 (Mr. Justice Brennan, concurring). The less expansive position of the United States which was advocated in *Mersky* and adopted by Justices Frankfurter, Harlan, and Stewart (dissenting opinion *id.* at 452-453, 455-458) is based upon the common law meaning of the parent statutory term "special plea in bar"; that is, a plea by way of confession and avoidance which does "not contest the facts alleged in the declaration, but relie[s] on new matter which would deprive those facts of their ordinary legal effect. \* \* \* It set[s] up affirmative defenses which would bar the prosecution" (*id.* at 457). The legislative history of the 1907 Act indicates that the Congress was using the term in its common law meaning. See statements of Senators Patterson and Nelson quoted in the text, *supra*, pp. 22-23. (

The defendant argues that the United States cannot be allowed a writ of error in a criminal case like this. We do not perceive the difficulty. No doubt of the power of Congress is intimated in *United States v. Sanges*, 144 U.S. 310. If the Fifth Amendment has any bearing, the act of 1907 is directed to judgments rendered *before the moment of jeopardy is reached*. \* \* \* [Emphasis added.]

The legislative history of the 1907 Act is far more confusing on this aspect than on the plea in bar situation. The senators, both proponents and opponents of the bill, were familiar with the case of *United States v. Ball*, 163 U.S. 662, holding that a person who has a verdict against him set aside may be tried anew for the same offense on the theory that he arrested or waived the former jeopardy (41 Cong. Rec. 2193, 2752, 2756). They also seemed to accept the view then prevalent that, to sustain a plea of double jeopardy, the defendant had to be put to trial under a "valid" indictment (41 Cong. Rec. 2192, 2746, 2751, 2756). Senator Nelson, for example, quoted cases which he said "show that the proper criterion in all these cases as to whether the defendant has been put in jeopardy or not is whether, if in any form before there has been a trial and a verdict the indictment is held defective and bad because it does not charge a criminal offense, the defendant can be reindicted, rearrested, and tried over again"; he said that the bill except for the jeopardy clause was limited to those cases "where the defendant can be reindicted, rearrested, and retried for the same offense" (41 Cong. Rec. 2756). There was agreement,

even by Senator Rayner, the most active opponent of the measure, that if a judge arrested judgment, the defendant could be tried anew (41 Cong. Rec. 2747). When questioned if such a person had not been in jeopardy, Senator Rayner said such a person "has never been in jeopardy, upon the principle that he has arrested the jeopardy by his own motion." Senator Knox then pointed out that a demurrer and motion in arrest were actions of the defendant (41 Cong. Rec. 2748).

Senator Knox also said later (41 Cong. Rec. 2752):

\* \* \* This bill allows to Government an appeal only from—

Defendant's motion to quash or set aside indictment;

Defendant's demurrer to indictment;

Defendant's motion, successfully made, in arrest of judgment for insufficiency of the indictment;

A judgment sustaining defendant's special plea in bar.

These proceedings are all defendant's acts before a verdict to prevent a trial, except the motion in arrest of judgment, which is defendant's act after a verdict against him to defeat a judgment on the verdict. These motions of defendant rest upon the want of jurisdiction of the court, the unconstitutionality of the statute, or some other lack of right to proceed to trial or to judgment on the verdict, the effect of all of which is to defeat the jeopardy. Mark this: It is not proposed to give the Government any appeal under any circumstances when the de-



defendant is acquitted for any error whatever committed by the court.

We can not give the Government an appeal or writ of error in any case where a judgment of reversal would put the defendant again in jeopardy, and this bill does not undertake to do so. It gives the Government an appeal only when the defendant has been successful in defeating his jeopardy by defeating the trial.

The Government takes the risks of all the mistakes of its prosecuting officers and of the trial judge in the trial, and it is only proposed to give it an appeal upon questions of law raised by the defendant to defeat the trial and if it defeats the trial.

The defendant gets the benefit of all errors in the trial which are in his favor, and can challenge all errors in the trial which are against him. It is certainly not too much when he attacks the trial itself or the law under which it is conducted to give the people the right to a decision of their highest courts upon the validity of statutes made for their protection against crime.

On the other hand, there is no doubt that the expectation was that, except for a motion in arrest of judgment, the rulings to which the bill related would occur before a jury was sworn (see statement of Senator Bacon, 41 Cong. Rec. 2192). The clearest statement to such effect was made by Senator Patterson as follows (41 Cong. Rec. 2752):

I do not care how broad or indefinite or definite the definition of "jeopardy" may be[.] I maintain, whatever the definition is, that no jeopardy can attach in cases in which writs of error

will lie under the Senate bill, bills of exception and writs of error being, first—

From the decision or judgment quashing or setting aside an indictment.

That is, as a rule, before pleading. The motion to quash an indictment is, as a general rule, filed before the prisoner is required to plead guilty or not guilty. If the prisoner pleads guilty or pleads not guilty in order that the motion to quash may be heard and decided by the court, the plea of not guilty is set aside or held as not having been made.

Mr. SPOONER. And they ask leave of the court to withdraw it.

Mr. PATTERSON. And they ask leave to withdraw the plea of not guilty.

Mr. SPOONER. A request which is always granted.

Mr. PATTERSON. So that nothing that squints at jeopardy has existed up to the time the court has passed upon the motion to quash the indictment.

What is the next?

From the decision or judgment sustaining a demurrer to an indictment or any count thereof.

A demurrer is simply another form of a motion to quash. A demurrer simply reaches the insufficiency of the indictment to put the defendant upon his trial, and therefore it also is interposed before the defendant is required to plead. If he has pleaded before the demurrer can be heard and determined, the request will be made to withdraw the plea of the defendant until the demurrer has been heard and passed upon by the court.

This statement was made after Senator Rayner, the leading opponent of the bill, had raised a question as to what would happen if, at the end of testimony, the court *sua sponte* decided that the statute was unconstitutional or had been repealed (41 Cong. Rec. 2748-2749). Since the question was never precisely answered, it appears that the remarks just quoted were meant as an answer to that question. In view of the principle that the Criminal Appeals Act sets forth an "exceptional right \* \* \* given to the Government" and is therefore to be strictly construed (*United States v. Borden Co.*, 308 U.S. 188, 192; *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States* (Wolfson & Kurland ed., 1951), pp. 321-322) we are not prepared to dispute the interpretation of the Act which has obtained since 1907.

*B. The Motion Here Involved Was Properly Treated As A Motion In Arrest of Judgment.*

Since we do not contend that we can rely on the demurrer or plea in bar aspects of the Criminal Appeals Act, the questions of appealability and the jurisdiction of this Court on direct appeal, in our view, turn upon the question of whether the motion here may properly be treated as a motion in arrest of judgment, and, if so, whether it is "based upon the invalidity or construction of the statute upon which the indictment or information is founded."

1. As indicated in our Jurisdictional Statement, we believe the present case is appealable to this Court under the "arresting a judgment" subdivision of the

Criminal Appeals Act. Appellee's motion (twice amended), which was granted by the trial court, purported to be—and was labeled—a motion in arrest of judgment and was submitted, pursuant to Rule 34, F.R. Crim. P., and the common law and statutory understanding as to the time for making such motions, "after \* \* \* finding of guilty." The court treated the motion as one in arrest of judgment, finding that the indictment "does not charge an offense" (A. 263).

The problem as to whether the order may properly be treated as one granting a motion in arrest of judgment arises from the fact that the Court, in granting appellee's motion, did not base its action wholly on the allegations of the indictment, but used as a partial predicate for its constitutional rulings the undisputed fact, which appeared from the evidence at trial, that appellee is a non-religious conscientious objector to participation in the Vietnam conflict.<sup>3</sup> We do not dispute the proposition that Congress, in the 1907 Act (and indeed in the 1942 amendments which gave a right of appeal to courts of appeal from orders granting motions in arrest not appealable to the Supreme Court), used the term in its common law sense which is in turn embodied in Rule 34, F. R. Crim. P. As

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<sup>3</sup> The indictment, which was in the standard form, merely charged that appellee, on or about April 17, 1968, knowingly refused to obey the order of his local Selective Service board to submit to induction. That appellee claimed to be a conscientious objector of some kind was made clear in his memorandum in support of his pre-trial motion to dismiss the indictment; the memorandum, however, did not explain the non-religious or other specific nature of his conscientious objector beliefs. See *United States v. Sisson*, 294 F. Supp. 515, 519.

stated in Rule 34, a motion in arrest of judgment may be granted "if the indictment of information does not charge an offense or if the court was without jurisdiction of the offense charged." A motion in arrest of judgment is thus, in effect, a delayed demurrer and cannot reach defects in the sufficiency or reception of evidence or in the conduct of the trial. See *United States v. Green*, 350 U.S. 415; *United States v. Bramblett*, 348 U.S. 503. In *Green* three Justices dissented from the Court's consideration of the issues on the ground that, in order to qualify as a "decision arresting a judgment of conviction for insufficiency of the indictment," a district court may not (even in part) utilize facts not alleged in the indictment as an "independent ground" in support of its judgment (350 U.S. at 421). The majority of the Court in *Green* did not disagree on this point (differing only as to the nature of the ruling below). It said (*ibid.*):

On this appeal the record does not contain the evidence upon which the court acted. The indictment charges interference with commerce by extortion in the words of the Act's definition of that crime. *We rule only on the allegations of the indictment* and hold that the acts charged against appellees fall within the terms of the Act. \* \* \* [Emphasis added.]

The doctrine enunciated in *Green*, however, does not govern the situation here. The district court in this case did not purport, even in part, to render a judgment on the merits (akin to an acquittal) that the evidence was not sufficient to show that appellee committed the offense charged. Rather, the court



here merely used the fact of appellee's non-religious form of conscientious objection to a particular war as the circumstantial framework for its ruling that the indictment was constitutionally insufficient as applied to appellee. This Court has recognized that a stipulation of facts by the parties in a criminal case may properly be treated by the district court as supplementing the indictment (like a bill of particulars), so that a decision dismissing the charge, which utilizes the facts established by the stipulation, is nonetheless appealable to this Court under 18 U.S.C. 3731 where the basis for the decision is the invalidity or construction of the underlying statute. *United States v. Halseth*, 342 U.S. 277; see also *United States v. Fruehauf*, 365 U.S. 146. We see no reason why the same reasoning does not apply to the delayed demurrer represented by a motion in arrest of judgment. It is no doubt true, as the Second Circuit stated in *United States v. Zisblatt*, *supra* (discussed *supra*, pp. 18-19; 172 F.2d at 741-742),

that at common-law a motion in arrest of judgment raised no objections which did not appear "upon the face of the record." "No defect in evidence or improper conduct on the trial can be urged at this stage of the proceedings." The "face of the record" includes nothing more than the judgment roll; and indeed, the common-law knew nothing of the evidence taken at trial until the Statute of Westminster allowed exceptions to be sealed and a bill of exceptions to be brought up with the roll on writ of error. For this reason it was held before the Rules that upon appeal any ruling whose validity de-

pended upon the evidence taken at the trial, was not reviewable by motion in arrest; and the Rules have made no change. \* \* \*

We, therefore, have no quarrel with the holding in *Zisblatt* that a ruling on the statute of limitations, which involved neither the validity of the indictment as such, nor the jurisdiction of the court, could not be treated as action on a motion in arrest of judgment. What we say, however, is that, while the government's right of appeal is limited to the class of cases recognized as falling within a motion in arrest of judgment, there is no reason at this time to read into that class of cases all the niceties of what might or might not have been included in the judgment roll at common law. As noted above, this Court in *United States v. Halseth*, 342 U.S. 277, did not read the Act in such a narrow fashion since the stipulation of facts on which the ruling was based there would not have been part of the judgment roll at common law. In that case the Court recognized that a decision before jeopardy on stipulated facts represented the kind of decision which the Criminal Appeals Act was intended to reach—a decision on a question of law which involved the validity or construction of a statute. That is the situation here.

The government accepted the specific facts relied on as to the nature of appellee's beliefs so that, as the district court noted, the entire case "in substance \* \* \* arises upon an agreed statement of facts" (A. 250). In these circumstances, to construe the Criminal Appeals Act as precluding appeal of the decision below would unwarrantedly exalt form over substance. There

is no genuine difference between this case and one in which the nature of appellee's conscientious objector views would be set forth in the indictment itself, or formally stipulated to on a motion to dismiss. All such cases present the type of situation for which the Criminal Appeals Act was designed—a decision on the constitutionality of a statute generally. The instant decision is therefore properly treated, in accordance with the intent of the parties and the trial judge, as “arresting a judgment of conviction for insufficiency of the indictment” and is thus appealable directly to this Court under the Criminal Appeals Act.

2. The Criminal Appeals Act provides, in both the demurrer and arrest of judgment clauses, for appeal to this Court from a decision holding an indictment invalid “based upon the invalidity or construction of the statute upon which the indictment is founded.” The indictment here alleged a violation of Section 12(a) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 462(a)), in that the appellee knowingly refused to obey an order of his local Selective Service board to submit to induction. On the indictment, as amplified by the agreed facts, *i.e.*, that appellee was a sincere non-religious objector to the Vietnam conflict, the district court ruled that Congress had no authority to require him to report for induction into the Armed Forces when such service could include duty in Vietnam. This part of the opinion is

thus clearly a construction of Section 12(a), the statutory provision upon which the indictment was founded.

The district court also held that Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 456(j)), as applied to appellee, violated the Establishment Clause of the First Amendment in that it unreasonably discriminates between religious and non-religious conscientious objectors. Strictly construed, the indictment was not "founded" on Section 6(j). However, since it was implicit in the indictment that the order which appellee disobeyed was a *lawful* order, the validity of appellee's classification was an issue subsumed in the charge, and the court's holding that the conscientious objector exemption provision is invalid amounts to a ruling as to the invalidity of a statute "upon which the indictment is founded." Compare *United States v. Borden Co.*, 308 U.S. 188, 194-195; *United States v. Kapp*, 302 U.S. 214, 216. Moreover, since the district court was not undertaking to invalidate all of Section 6(j) insofar as it applied to those persons exempted by its terms, the effect of the court's decision was to hold that the federal judiciary could not constitutionally undertake to punish a person who had unlawfully been denied the exemption given to others. In thus holding that the court could not, on the agreed facts, punish the appellee for refusal to submit to induction, the court was again con-

struing Section 12(a), the statute on which the indictment was founded.<sup>9</sup>

II. A SELECTIVE CONSCIENTIOUS OBJECTOR HAS NO CONSTITUTIONAL RIGHT TO EXEMPTION FROM COMBATANT SERVICE IN VIETNAM.

The district court held that appellee could not be lawfully conscripted in the Armed Forces of the United States because there was a substantial possibility that he would be sent to serve in the Vietnam conflict to which he is sincerely and conscientiously opposed on non-religious grounds. This ruling does not depend on any finding that appellee is conscientiously opposed to war in any form, whether on religious or non-religious grounds, but applies to any person who conscientiously opposes the particular decision of the United States government that it is necessary to send conscripted persons to fight in Vietnam. It does not depend on any congressional judgment that there is no need for military service by persons who sincerely oppose military action in a particular area of operations. No claim is made—and manifestly there can be none—that Congress has now, or has ever, undertaken to exempt from general conscription persons who sin-

<sup>9</sup> If the Court should agree that the motion here granted was one in arrest of judgment, but should hold that it did not represent a construction of the statute on which the indictment is founded, the decision of the district court is still appealable, but the appeal would lie in the court of appeals. Whatever the scope of the 1942 amendments to the Criminal Appeals Act, it is clear that any order granting a motion in arrest of judgment which is not appealable to the Supreme Court is appealable to the appropriate court of appeals. See 18 U.S.C. 3731.



cerely oppose the decision to fight in a particular area at a particular time. Rather, the district court, on the basis of its own determination that there is not a "national need for combat service" from persons who sincerely oppose the conflict in Vietnam, has held that Congress is without constitutional power to require the induction of appellee into the Armed Forces at a time when he might be sent to that country. The decision below thus rests, not on any finding of unconstitutional discrimination by Congress, but on a determination by the district court that, at this time and in relation to the Vietnam conflict, the dictates of individual conscience are qualitatively superior to "the country's present need" for combatant service from persons who, as a matter of individual conscience, disagree with the present foreign policy of the United States. The decision is thus in many respects unique, both in its assumption as to the proper functions of courts and in its elevation of the role of individual conscience to a preeminent place as regards obedience to the laws of the nation.

1. As noted in the Jurisdictional Statement, there is a threshold question here as to whether appellee's objections to the Vietnam conflict are even a proper issue in this case. Appellee is not being prosecuted for failure to obey an order to go to Vietnam; he is being prosecuted for failure to submit to induction into the Armed Forces. Appellee's induction would not immediately occasion his being sent to Vietnam, and would not necessarily result in his ever being sent there. Thus, the court undertook to excuse a deliber-

ate violation of law on the basis of events which may or may not occur in the future. Such a speculative situation does not provide a proper basis for constitutional adjudication.

In *United States v. Raines*, 362 U.S. 17, where a district court had held an act of Congress invalid because it was susceptible of an interpretation that was constitutionally impermissible, this Court reversed. It quoted with approval the language in *Liverpool, N.Y. & P. S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, that the Court was bound by two rules: "one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied" (*id.* at 21). See, e.g., *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-347 (Justice Brandeis, concurring); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-569. As to the specific matter here involved, see *United States v. Mitchell*, 369 F. 2d 323 (C.A. 2), certiorari denied, 386 U.S. 972. There the Second Circuit held that the defendant's challenge to the legality of our Vietnam involvement provided no defense to his criminal prosecution for failure to report for induction into the Armed Forces, since the congressional authority "to raise and support armies" was "quite distinct" from whatever use might be made by the President of conscripted troops (369 F. 2d at 324). A similar analysis should have been applied here so as to preclude judicial consideration of appellee's contentions.

2. Assuming that the question is reached, we think it clear that the district court went far beyond the limits of judicial power in undertaking to decide, on the basis of its balancing of the considerations it deemed applicable, whether an individual's conscientious objection to a particular war—on either religious or non-religious grounds—gave him a constitutional right to disobey an act of Congress.

The district court, although it declined to treat the issue as authoritatively settled, assumed "that a conscientious objector, religious or otherwise, may be conscripted for some kinds of service in peace or in war" (A. 256-257). The court further assumed "that in time of declared war or in the defense of the homeland against invasion, all persons may be conscripted even for combat service" (A. 257).<sup>10</sup> It ruled that the question of constitutional objection to a particular

<sup>10</sup> On the narrow review which is available under 18 U.S.C. 3731, we do not think the validity of these underlying assumptions—on which the actual holding does not rest—is before the Court. See *United States v. Automobile Workers*, 352 U.S. 567, 589-593. Cf. *United States v. Fancher*, pending on direct appeal, No. 900, this Term, where the construction of a statute appears to us to have been influenced by doubts as to constitutionality if read literally and where, therefore, we do deem the constitutional issue to be before the Court.

In any event, this Court has recently recognized that Congress may lawfully conscript for military service either in time of peace or war. *United States v. O'Brien*, 391 U.S. 367, 377. See also *Selective Draft Law Cases*, 245 U.S. 366; *Hamilton v. Regents*, 293 U.S. 245; *United States v. Henderson*, 180 F. 2d 711 (C.A. 7); *Etcheverry v. United States*, 320 F. 2d 873 (C.A. 9), certiorari denied, 375 U.S. 930; *Warren v. United States*, 177 F. 2d 596, 599 (C.A. 10), certiorari denied, 338 U.S. 947.

war "is an area in which competing claims must be explored, examined, and marshalled with reference to the Constitution as a whole" (A. 257), that "some sincere objections have greater constitutional magnitude than others" (A. 261), and that the courts are under a duty to discern degrees of constitutional magnitude when such claims are made (*ibid.*). It thus undertook to decide whether a specific objection to participation in a particular area of conflict should or should not be given constitutional protection, whether the claim is based on religious grounds or not.

We submit that the constitutional grant of power to Congress to raise and maintain armies (Art. I, Sec. 8) is not properly subject to the "balancing" approach applied in the instant case. The authority to determine whether or not this country needs a particular individual's services in the Armed Forces is vested in the Congress, not the courts. Of course, in determining who shall be exempt from combatant service, Congress may not invidiously discriminate against any class or person or violate individual rights guaranteed by the Constitution.<sup>11</sup> *E.g., Speiser v. Randall*, 357 U.S. 513. There is, however, no constitutional right to obey only those laws with which one agrees. It is not the province of courts to decide whether a particular law or particular foreign policy is good or bad, or whether there is or is not any need for specified numbers of men in a particular place at a certain time. This de-

<sup>11</sup> Contrary to appellee's allegation (Motion to Affirm, p. 8), nowhere in our Jurisdictional Statement have we indicated that there could not be judicial review of an arbitrary action in this regard.

termination is the very essence of a "political question," unsuited for judicial scrutiny. See, *e.g.*, *Baker v. Carr*, 369 U.S. 186, 217; *Johnson v. Eisentrager*, 339 U.S. 763, 788-789; *Ludecke v. Watkins*, 355 U.S. 160, 170; *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 111; cf. *Powell v. McCormack*, 395 U.S. 486, 518-549. As was said in *Pauling v. McNamara*, 331 F. 2d 796, 799 (C.A.D.C.):

In framing policies relating to the great issues of national defense and security, the people are and must be, in a sense, at the mercy of their elected representatives. \* \* \* Our entire System of Government would suffer incalculable mischief should judges attempt to interpose the judicial will above that of the Congress and President, even were we so bold as to assume that we can make better decisions on such issues.

Yet, under the balancing approach of the court below, the judiciary would of necessity have to decide, as the district court did here, whether the United States does or does not need to take into the Armed Forces men who do not agree with its foreign policy of the moment. While admitting the right of Congress to draft appellee for combatant service in time of national necessity, the court below has substituted its opinion for that of the legislative and executive branches as to what constitutes national need. It has determined that sufficient necessity has not been demonstrated for Congress to require combatant service at the present time from one who is personally—albeit sincerely—opposed to fighting in Vietnam. In



our view, a court has no power under the Constitution to make that determination. Judges are not the persons charged with the responsibility for determining the national need for military manpower. They should not be called upon to "balance" the magnitude of an individual's objection, however conscientious, and the needs of the nation. They are required to construe and apply legislation in this regard as enacted by Congress. But Congress has determined to excuse from combatant service only those who are "opposed to participation in war in any form" (50 U.S.C. App. (Supp. IV) 456(j)). That legislative judgment is not only entitled to respect; it establishes the policy to be followed in this matter, no less by judges than by others, unless that policy runs afoul of some constitutional command.<sup>12</sup>

3. It is of course true that, under our Constitution, Congress does not have untrammelled freedom of action, even in the exercise of its specifically granted power "[t]o raise and support Armies" (Art. I, Sec. 8). Congress may not act in a way which deprives

<sup>12</sup> In its decision in *United States v. Seeger*, 380 U.S. 163, on which appellee appears to place considerable reliance (see Motion to Affirm, pp. 6, 9), this Court repeatedly referred to the notion of opposition to "participation in war in any form" as a statutorily necessary and constitutionally appropriate prerequisite to an allowable conscientious objector claim (380 U.S. at 165, 171, 172). Thus, while the question was not there squarely presented, the Court did in *Seeger* give at least implicit recognition to validity of the position here urged—that Congress is not constitutionally required to take account of "selective" conscientious objection to particular wars. See generally Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 Va. L. Rev. 1355, 1370 (1968).

a person of religious freedom or establishes a religion in violation of the First Amendment. Nor may it arbitrarily discriminate between persons or classes in violation of the due process clause of the Fifth Amendment. It is our position that Congress has done neither in limiting the scope of Section 6(j) to those opposed to war "in any form."

a. So far as the "selective" conscientious objector is concerned, Congress has made no distinction between religious and non-religious motivations. It has not exempted from the duty to submit to induction into the Armed Forces those persons who, because of their religious convictions, deem a particular war to be morally wrong. Thus, as to the question which this case presents—the right to require service from one who is morally opposed to a particular conflict—there is no basis for a claim that Congress has shown a preference for religious against non-religious moral beliefs. The Establishment Clause of the First Amendment thus has no bearing on the issue here involved.

b. Nor can it reasonably be maintained that, in deciding to require service of one who might be sent to an area where in conscience he does not believe American troops should be, Congress has violated the freedom of religion of a Selective Service registrant like appellee. It is settled that, as the decision of the court below recognizes, however untrammelled may be the freedom to believe, religious freedom does not require that religious scruples be recognized as justifying disobedience to a valid law. *Cantwell v. Connecticut*, 310 U.S. 296, 303-304; *Jacobson v. Massa-*

*chusetts*, 197 U.S. 11, 29. As discussed above, the district court endeavored to bring the First Amendment into the case by deciding that it had the right to balance the magnitude of the beliefs held against what it perceived to be the need of the nation for manpower. If that balancing approach is wrong—and we think it clearly is as to the issue here—no First Amendment question is presented.

In *Hamilton v. Regents*, 293 U.S. 245, 268, a group of religious persons sought exemption from compulsory military training at the University of California. Their claim was rejected. Quoting with approval the language in *United States v. Macintosh*, 283 U.S. 605, 623, this Court observed (293 U.S. at 264):

The conscientious objector is relieved from the obligations to bear arms in obedience to no constitutional provisions, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. \* \* \* The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress. \* \* \* [T]he war powers \* \* \* include \* \* \* the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. \* \* \*

In a concurring opinion, Justice Cardozo, joined by Justices Brandeis and Stone, recognized that an extension of the conscientious objector's liberty might

lead to wholly incongruous situations (293 U.S. at 268):

Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.”

See also *In Re Summers*, 325 U.S. 561. Religious conviction, no matter how sincere, is not violated because a person is punished for doing that which Congress has validly decreed should not be done.

At all events, appellee does not base his objection to military service on any religious beliefs. It is difficult, therefore, to perceive how his rights under the

“In like vein, Circuit Judge Augustus Hand stated for the court of appeals, in *United States v. Kauten*, 133 F. 2d 703, 708 (C.A. 2), that: “There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.”

Free Exercise Clause of the First Amendment could be impaired as a result of his being conscripted. Viewing the concept of religion in the broadest scope recognized in this court's decisions (see, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 495; *Abington School District v. Schempp*, 374 U.S. 204, 222-223), appellee is nonetheless not in a position to claim protection from the First Amendment for his distinctly and designedly non-religious opposition to participation in the Vietnam conflict.

Only if the Free Exercise Clause is broadened to encompass a general right of conscience to object to and refuse to comply with specific governmental policies would that provision be useful to appellee.<sup>14</sup> And if that provision is given such a sweeping scope, it would of necessity extend beyond the Selective Service context and reach all matters as to which an individual claimed to be conscientiously opposed (see *infra*, pp.

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<sup>14</sup> Language purporting to protect a general "right of conscience" was in fact included in early drafts of the Bill of Rights, but was eliminated from the provisions finally adopted and submitted to the States for ratification. See Russell, *Development of Conscientious Objector Recognition in the United States*, 20 Geo. Wash. L. Rev. 409, 416-417 (1952). Nonetheless, our nation's treatment of conscientious objectors, as formulated by Congress, has historically been enlightened and compassionate, and actually dates back to colonial times. In order to guard against the possibility of widespread abuse of this policy, however, Congress has necessarily placed certain limitations on the range of circumstances within which opposition to war will be taken into account. Appellee's situation—as a non-religious, selective objector—is, for understandable reasons, not included in the ambit of conscientious objection given legislative recognition. Nor was Congress, for the reasons developed earlier, required to do so as a constitutional matter.



48-49). See general Comment, 34 U. Chi. L. Rev. 79, 102 (1966). Such a construction of the First Amendment is without precedent. It would be wholly destructive of the orderly functioning of government and would undermine the essential integrity of the democratic process. To the extent, then, that the district court based its decision to the contrary on First Amendment grounds, that decision is plainly an erroneous one.

c. There remains the question whether it is arbitrary for Congress, in granting exemption from combatant service to discriminate between persons who oppose all wars and persons who oppose a particular war.<sup>15</sup> That such a distinction has a rational basis seems self-evident. Opposition to a particular war, no matter how sincerely and morally motivated, necessarily involves a political judgment. It represents the individual's personal conclusion that the policy adopted by the duly elected representatives of his government is wrong at a certain time in relation to a particular area of operations. Those who oppose participation in combat in any form do not make the same type of immediate political judgment. Their rejection of war in any form is based, not on the political judgment of the moment, but on inherent characteristics of military combat, on beliefs that it is wrong to kill for any purpose at any time. Accord-

<sup>15</sup> As noted above, as to the "selective" conscientious objector, no distinction is drawn between those whose beliefs stem from religious or non-religious grounds. For that reason, the only classification relevant to this discussion is the distinction between those who oppose all wars and those who oppose a particular war on grounds of conscience.

ingly, Congress may validly conclude that there is a qualitative difference between persons whose beliefs cause them to oppose participation in all wars and those who wish to reserve the right to choose the wars in which they will fight. Except for the court below, all the courts which have examined the question have determined that Congress may validly draw a distinction between those who oppose all wars and those whose objection is only to a particular war. *Negre v. United States*, No. 24067 (C.A. 9), decided November 7, 1969; *United States v. Spiro*, 384 F. 2d 159 (C.A. 3), certiorari denied, 390 U.S. 956; *Clay v. United States*, 397 F. 2d 901 (C.A. 5), vacated and remanded on other grounds, 394 U.S. 310; *United States v. Hartman*, 209 F. 2d 366, 370-371 (C.A. 2); *Taffs v. United States*, 208 F. 2d 329, 331 (C.A. 8); *United States v. Kurki*, 255 F. Supp. 161, 165, affirmed, 384 F. 2d 905; see also *Sicurella v. United States*, 348 U.S. 385. The district court took the position that the "magnitude" of an individual's conscientious objection is not appreciably lessened because his beliefs relate to a particular war. It is not, however, the magnitude but the nature of the objection which gives rise to the distinction. Congress could reasonably conclude that a government cannot allow political dissent to excuse a person from the duties imposed by the government on all persons in the same class.

Indeed, appellee's situation is little different from that of a person who—sincerely and conscientiously—opposes any number of governmental policies for political reasons. For example, some citizens might genuinely

object to a requirement of open access to housing without regard to race. But that hardly means that their views should prevail over national policy in this regard, and justify their non-compliance with such a law. Similar examples that might be given are legion, and do not differ significantly from the situation here at issue. The point, in short, is that if "selective" conscientious objection to participation in combatant service, *i.e.*, in a particular war, is judicially allowed, there is no logical stopping place insofar as persons who oppose other governmental policies are concerned. This analysis confirms both the soundness and the wisdom of the traditional application of the "political question" doctrine by the courts to such matters.<sup>16</sup> That is the approach the district court should have followed here.

<sup>16</sup> It is interesting and instructive to note the reasons on which a majority of the so-called Marshall Commission which studied the Selective Service laws several years ago based its opposition to statutory recognition of a special status for the "selective" conscientious objector. See Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?*, pp. 48-51 (1967). Concluding that "the status of conscientious objection can properly be applied only to those who are opposed to all killing of human beings under any circumstances," the Commission stated: "It is one thing to deal in law with a person who believes he is responding to a moral imperative outside of himself when he opposes all killing. It is another to accord a special status to a person who believes there is a moral imperative which tells him he can kill under some circumstances and not kill under others" (*id.* at 50). Other points mentioned by the commission include the following: 1) "[S]o-called selective pacifism is essentially a political question of support or non-support of a war and cannot be judged in terms of special moral imperatives"; such "[p]olitical opposition to a particular

### III. THE DISTRICT COURT ACTED GRATUITOUSLY IN RULING THAT SECTION 6(j) INVALIDLY DISCRIMINATES BETWEEN RELIGIOUS AND NON-RELIGIOUS CONSCIENTIOUS OBJECTORS

As appears from the Statement, appellee, both in his motion to dismiss before trial and in his motion in arrest of judgment after trial, claimed that his moral objections to the Vietnam conflict were entitled to constitutional protection. He has never claimed to be opposed to participation in war in any form. Nor do we understand the decision below to treat appellee as a conscientious objector to war in any form. Rather, the district court found that a sincere objection to a particular war is a conviction commensurate in magnitude, as a constitutional matter, to a sincere objection to all war. It then went on to rule that insofar as Section 6(j) discriminates between religious and non-religious sincere objectors, the statute violates the Establishment Clause of the First Amendment. In so doing, the district court has reached out

war" is more properly "expressed through recognized democratic processes" and is entitled to no exemption from decisions reached through those processes; 2) "[L]egal recognition of selective pacifism could open the doors to a general theory of selective disobedience to law, which could quickly tear down the fabric of government; the distinction is dim between a person conscientiously opposed to participation in a particular war and one conscientiously opposed to payment of a particular tax"; 3) Allowing "the selective pacifist to avoid combat service by performing noncombatant service in support of a war which he had theoretically concluded to be unjust" (which would be the apparent result of the decision below here) is unjustifiable; and 4) "[L]egal recognition of selective pacifism could be disruptive to the morale and effectiveness of the Armed Forces" (*id.* at 50-51).

and decided an issue which was not necessarily subject to adjudication in this case, and which it did not need to consider in order to resolve the instant controversy.

The question whether Congress may validly discriminate between religious and non-religious conscientious objectors is not presented here because, as discussed above, Congress in enacting Section 6(j) has not granted any exemption to the "selective" conscientious objector, religious or non-religious. It has provided for the granting of an exemption only to those who conscientiously oppose participation in all wars. Since appellee does not oppose all wars he would not be entitled to exemption under Section 6(j), whether or not his beliefs stemmed from religious conviction. As to appellee, therefore, the only issue of discrimination in Section 6(j) which is presented is that already discussed, *i.e.*, whether Congress may constitutionally distinguish between those who conscientiously oppose all wars and those who conscientiously oppose a particular war.

Whether Congress may constitutionally grant exemptions to persons whose objection to war in any form stems from religious conviction and not to persons whose similar general objection has non-religious roots is thus not involved here. That issue is pending before this Court in *Welsh v. United States*, No. 76, this Term, in which certiorari was granted on October 13, 1969, and which will be argued along with this case (see A. 268), and also in *McQueary v. United States*, No. 88 Misc., this Term, and *Vaughn v. United States*, No. 35 Misc., this Term, which are pending on



petitions for writs of certiorari. However it is ultimately decided, its resolution will not aid appellee, the propriety of whose criminal conviction depends upon a ruling as to whether "selective" conscientious objection to a particular war is entitled to constitutional protection without a statutory base. The district court should therefore not have undertaken to decide in this case whether Congress could constitutionally discriminate, as it has in Section 6(j), between religious and non-religious objectors to participation in all wars. As this Court said in *United States v. Raines*, 362 U.S. 17, 21, "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." See also *George v. United States*, 196 F. 2d 445, 452 (C.A. 9). Since no "selective" objector to war—religious or otherwise—is entitled to exemption under Section 6(j), the validity of Section 6(j) in relation to one who conscientiously opposes all wars on non-religious grounds should not be determined in this case.<sup>17</sup>

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<sup>17</sup> We recognize that appellee sought to raise several questions in his Motion to Affirm in addition to those presented in the government's Jurisdictional Statement. Those questions, *inter alia*, relate to whether Congress can constitutionally conscript manpower for the military in peacetime and to the legality of the United States' participation in the Vietnam conflict. As to the former, the district court assumed that Congress had such power, and its assumption in this regard is supported by considerable authority. With respect to the latter, the court below declined to decide the issue, as has this Court on several

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be reversed and that the case should be remanded to the district court with directions to enter judgment on the verdict.

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DECEMBER 1969.

occasions in the recent past. *E.g., Luftig v. McNamara*, 373 F. 2d 664 (C.A.D.C.), certiorari denied, 387 U.S. 945; *Mora v. McNamara*, 387 F. 2d 862 (C.A.D.C.), certiorari denied, 389 U.S. 934. Appellee's further contention that, if the legality of American participation in the Vietnam conflict is not justiciable, then the district courts have no jurisdiction over criminal prosecutions where the alleged illegality of that involvement is relied upon as a defense is, in our view, without substance. Appellee is entitled to acquittal only if his Selective Service classification was improper; in order to show that, he must demonstrate that the statutory scheme pursuant to which his conscientious objector claim was rejected is invalid. That issue is certainly a justiciable one, and one that has no direct relation to the question whether our military involvement in Vietnam is a matter that the courts can consider.



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# Supreme Court of the United States.

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OCTOBER TERM, 1969.

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No. 305.

UNITED STATES OF AMERICA,  
*Appellant,*

*v.*

JOHN HEFFRON SISSON, JR.,  
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MASSACHUSETTS.

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## BRIEF FOR THE APPELLEE.

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### Opinions Below.

The opinion of the United States District Court for the District of Massachusetts granting the appellee's motion in arrest of judgment (A. 248-264) is reported at 297 F. Supp. 902. Three prior opinions of the district court rejecting other claims that the Act is invalid (A. 80-102) are reported at 294 F. Supp. 511, 515, 520.

### Jurisdiction.

On April 1, 1969, the district court entered an order granting the appellee's motion in arrest of judgment on

the ground that the statute upon which the indictment herein is founded, the Military Selective Service Act of 1967, 50 U.S.C. App. 451 *et seq.* (hereinafter sometimes referred to as the "Act" is invalid). The appellee is charged with having refused to obey an order, which was issued to him under authority of the Act, that he submit to induction into the armed forces of the United States. Such refusal is, by the Act, made a crime punishable by a penalty of up to five years imprisonment and \$10,000 fine. A notice of appeal to this Court was filed on April 23, 1969. On October 13, 1969, this Court entered an order, postponing further consideration of the question of jurisdiction to the hearing on the merits (A. 268).

18 U.S.C. 3731 confers jurisdiction upon this Court to review the decision of the district court on direct appeal. *United States v. Green*, 350 U.S. 415. The jurisdiction of this Court extends to grounds rejected by the district court, which challenge the validity of the Act. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 329-330. See the discussion below, pp. 15-21.

### **Constitutional Provisions.**

Article I, Section 8, of the Constitution of the United States provides in pertinent part:

The Congress shall have Power . . .

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;



To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article II, Section 2, of the Constitution of the United States provides in pertinent part:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . .

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .

Amendment I to the Constitution of the United States provides in pertinent part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

**Amendment II to the Constitution of the United States provides:**

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

**Amendment III to the Constitution of the United States provides:**

No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

**Amendment V to the Constitution of the United States provides in pertinent part:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger . . . nor be deprived of life, liberty, or property, without due process of law . . .

**Amendment IX to the Constitution of the United States provides:**

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

**Amendment X to the Constitution of the United States provides:**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

### **Statute Involved.**

Section 4(a) of the Act, 50 U.S.C. App. 454(a), provides in pertinent part:

The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces.

Section 6(j) of the Act, 50 U.S.C. App. 456(j), provides in pertinent part:

Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. . . .

Section 12(a) of the Act, 50 U.S.C. App. 462(a), provides in pertinent part:

Any . . . person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title

. . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both . . .

### **Questions Presented.**

1. Whether this Court has jurisdiction of the direct appeal from the decision granting a motion in arrest of judgment based on the invalidity of the statute upon which the indictment is founded.

2. Whether the power of Congress to raise and support armies is limited so as to not include the power to conscript in times of peace.

3. Whether the power of Congress to conscript is limited to occasions when sufficient military manpower cannot be procured through less burdensome means.

4. Whether the power of Congress to raise and support armies is limited so as to not include the power to conscript for an illegal war.

5. Whether, if the legality of the Vietnam war is held to be a political question, the district court is without jurisdiction of the offense charged against the appellee.

6. Whether the power of Congress to raise and support armies through conscription is limited by the religion clauses of the First Amendment and the due process clause of the Fifth Amendment so as to not include the power to conscript one who objects to the Vietnam war on grounds of conscience.

### **Statement.**

On September 27, 1968, the grand jury returned an indictment charging that Sisson wilfully had refused to sub-

mit to induction into the armed forces of the United States, as ordered by his local draft board "under and in the execution of the Military Selective Service Act of 1967. . . ."

Prior to trial, Sisson moved to dismiss the indictment on the grounds that, first, the Constitution does not empower Congress to conscript in time of peace (A. 34-40)\*; second, the Constitution does not empower Congress to conscript if a less burdensome alternative is available (A. 40-42); third, the Constitution does not empower Congress to conscript manpower for an illegal war (A. 16-21; 56-72); and fourth, the Constitution does not empower Congress to compel military service of an individual against the dictates of that individual's conscience (A. 31-33; 71). Sisson further proposed, as a complete defense, that he reasonably believed the Vietnam war to be illegal, and that his reasonable belief negated the existence of specific intent—which, he asserted, is an element of the offense (A. 2; 43).

The district court rejected the first three arguments on the ground that, while Sisson had the requisite standing (A. 80-82), these arguments on the constitutional limits of the power of Congress to conscript depend on the resolution of issues which are essentially political in nature and, therefore, not appropriate for judicial determination (A. 80-102). The district court also reserved decision on Sisson's claim that his refusal to submit to induction was an act of conscience protected by the Constitution (A. 93) and rejected the argument that specific intent is an element of the offense defined by the Act (A. 92-93; 180; 195; 238-239).

After trial, Sisson moved that the district court arrest judgment for insufficiency of the indictment on the grounds urged prior to trial (A. 265) and, inasmuch as the district court, by its rulings of substantive law rejecting those grounds had foreclosed his opportunity to present the substance of his defense, Sisson now urged that the district



court lacked jurisdiction of the offense charged in the indictment (A. 244-245).

On April 1, 1969, the district court arrested the judgment of conviction for insufficiency of the indictment, explicitly basing its decision on the invalidity of the statute upon which the indictment is founded (A. 263). As predicate for its conclusion that as applied to Sisson the Act is unconstitutional, the district court made the following undisputed findings of fact: "Sisson does not now and never did claim that he is or was in the narrow statutory sense a religious conscientious objector . . . But Sisson's table of ultimate values is moral and ethical . . . he was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion. Sisson's views [that the Vietnam war is illegal] are not only sincere, but, without necessarily being right, are reasonable" (A. 250-252).

The district court held that the free exercise of religion clause of the First Amendment and the due process clause of the Fifth Amendment prohibit the application of the Act to Sisson to require him to render combat service in Vietnam. In essence, the court held that under present circumstances the power to conscript Sisson for active duty in Vietnam is not necessary and proper: the court based its conclusion on the magnitude of Sisson's interest in not killing in the Vietnam conflict as against the want of magnitude in the country's present need for him to be so employed (A. 258, 261). The court further held, alternatively, that in granting a deferment to religious pacifists but not to Sisson, the Act violates the provision of the First Amendment that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (A. 263).

## Summary of Argument.

### I.

The appellee agrees with the conclusion of the government that the case is appealable to this Court under the "motion in arrest" language of the Criminal Appeals Act, 18 U.S.C. 3731, but believes that jurisdiction may also be sustained under the "decision . . . dismissing" or "motion in bar" clauses thereof.

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### II.

On the merits, appellee essentially makes one argument—Congress has no power to conscript him now—but he presents several variations on that one theme.

It is important at the outset to emphasize what appellee does not challenge here: he is willing to assume, for purposes of his argument, that Congress has the power to conscript in case of complete mobilization for a declared war such as the First or Second World War. Indeed, he is also willing to assume for present purposes that in a vital emergency, such as the Civil War, resort to conscription is likewise justified. In short, appellee does not maintain that Congress is without power to conscript under any and all circumstances.

Instead, the proposition he tenders is that the power to conscript is a limited one and that Congress has transgressed the constitutional limits in the Military Selective Service Act of 1967.

The first limit is that Congress has no power to compel military service in an undeclared war overseas. The historical record permits little doubt that Congress has no power to conscript under normal circumstances. Rather, it appears that the power to conscript in extraordinary emergencies such as the Civil War or the two World Wars,

the power to conscript "in the last extremity," can be inferred as one of the powers delegated to Congress—despite the historical record, but only because the power is essential to survival of the nation. Stated differently, the Constitution does not in terms deny the existence of that limited power, and in the absence of such an express prohibition the historical record cannot be persuasive that a power indispensable to self-preservation was withheld. On the other hand, this is as much as the historical record will allow. The first conscription bill proposed in this country, after war had been declared against Great Britain, after the Capitol had been burned, not only was not adopted but never reached the floor of either house of Congress. Indeed, even a militia law colorably authorized by the constitutional provision for cases of invasion did not pass. The history surrounding this 1814 measure, as well as the writings of the Federalists, provide a historical context for interpretation of the Constitution which permits no reasonable doubt that the power to conscript in times of peace was not delegated to Congress. The scope of any inferred delegated power to conscript is strictly limited to great emergencies and measured by the necessity of the power to cope with such emergencies. The power does not reach an undeclared war across the Pacific Ocean.

Assuming, contrary to the foregoing, that Congress may in some instances have the power to conscript for an undeclared foreign war, the limits of the power extend only to what is "necessary and proper." The Military Selective Service Act of 1967 is neither necessary nor proper for several reasons: in the first place, authoritative evidence indicates that a volunteer army has been, for several years, a viable alternative to the system of conscription. Volunteer manpower is available provided that adequate financial incentives are given. The cost of an all-volunteer force would be approximately 5% of the

present defense budget and could easily be absorbed within the present budget by reordering priorities: whatever the merits of the space exploration program, for example, Congress cannot appropriate funds for such a program and in the same breath claim that it cannot afford the cost of not resorting to compulsory military service. The matter would stand on a different footing if manpower were not available at any price or were available only at a price so extravagant as to make the volunteer plan impractical. Given existing circumstances, the power to conscript is not necessary and, therefore, does not exist.

Moreover, the Act is also not proper because of its arbitrary, selective nature. This point is related to the point that a volunteer army is a practical alternative and that the Act, therefore, imposes an unconstitutional tax on the few who are selected. Beyond that point of obvious injustice, however, the Act is also defective because of the arbitrary way in which it defines the manpower pool, for instance by excluding women, and because of the arbitrary way in which it reduces available manpower through deferments which "channel" registrants into specified civilian occupations. Assuming that Congress has the power to conscript for military service, it hardly follows that Congress has the power to conscript for civilian service as well. Pursued to its ultimate logic, the power to conscript combined with the power to "channel," which the Act asserts, is tantamount to an authorization of the existence of involuntary servitude.

Secondly, the Act is not proper because it delegates to the President the war powers vested in Congress by the Constitution. The Act purports to authorize the President to conscript men "... whether or not a state of war exists ..." and irrespective of the use to be made of such conscripts. The Act in fact has been applied to draft men for active duty in Vietnam. Assuming that Congress, by

appropriate exercise of its constitutional power might have sanctioned this practice, Congress could not do so by abdicating its constitutional responsibility and delegating its power to the President—which is precisely what Congress has done. The Tonkin Bay resolution, if viewed as authority for the President's use of the armed forces in Vietnam, represents an attempt at unlimited delegation of war powers which can only be exercised by Congress. Furthermore, even if Congress were thought to have "participated" sufficiently in the Vietnam venture to sanction the President's use of troops there, it would not follow that such participation is constitutionally sufficient for the purpose of raising such troops through conscription: the power to raise and support armies is distinct from the power to declare war, and Congress has often authorized a "limited" undeclared war without at the same time authorizing conscription therefor. Assuming that the Vietnam war has the blessings of Congress, still Congress may not hand over to the President the power to conscript without at least making a congressional judgment of the "necessity" without which the power itself does not exist.

Thirdly, the Act is not proper because, as applied, it purports to authorize conscription for an illegal war. The war is illegal not only because it is a presidential war, unauthorized by Congress unless such authorization is sought to be derived from an unconstitutional delegation of power from Congress to the President, but also because it violates various treaties, international agreements and rules of international law, notably the provisions of the SEATO Treaty, the Geneva Accords of 1954, Articles 51 and 33(1) of the United Nations Charter, and the rules and customs of warfare. Manifestly, the Constitution delegates no power whatsoever, express or implied, to conscript men for a war which by hypothesis is illegal. It follows that the Act is invalid if applied in pursuit of a war which vio-



lates either domestic or international law. The appellee cannot be deprived of this defense by holding the question of legality to be a political question without at the same time depriving the district court, as a court created under Article III of the Constitution, of jurisdiction over the offense—unless, of course, the appellee's reasonable belief that the war is illegal is a complete defense, since that defense would make irrelevant the question whether the war is in fact illegal. As for the appellee's standing to raise the question of legality, his standing is based not so much on the probability or possibility that he will himself be ordered to fight in Vietnam as on the causal relationship between the Vietnam war and his being ordered to report for induction: but for the Vietnam war, he would not have been drafted.

Finally, assuming that Congress has the power to compel military service in an undeclared foreign war, and assuming that the Act is in general a necessary and proper exercise of that power, the Act nonetheless cannot be applied to the appellee because the power is limited by the religion clauses of the First Amendment (alternatively by the protection of conscience afforded by the Ninth Amendment), as well as by the due process clause of the Fifth Amendment. The government denounces the balancing approach utilized by the district court. But that approach essentially starts from the incontrovertible fact that conscription of a religious pacifist is an abridgement of his right to free exercise of religion, while conscription of one who does not oppose war involves no interference with his free exercise of religion. From that premise, or its equivalent, the district court reasoned that the power to conscript the latter man might be necessary and proper under circumstances when the power would not be necessary and proper with respect to the religious pacifist. This constitutional principle of selectivity, far from being new, has

its statutory counterpart in the Act which authorizes conscription of some and deferment or exemption of others precisely on the basis of necessity. The government is surely wrong in asserting that the First, Fifth and Ninth Amendments establish no constitutional priorities, that Congress has an unfettered discretion in judging necessity (apart from the question of invidious discriminations). The Constitution does grant special protection to freedom of conscience and, if conscientious objectors are nonetheless subject to the draft, this is true only "in the last extremity."

Moreover, the Act violates the First Amendment prohibition against an establishment of religion. The government seeks to characterize all so-called "selective" objectors as political objectors and to deny that a selective objector may nevertheless be a religious objector (A. 47). If its position is incorrect, which it patently is, then the government is also incorrect in asserting that Congress may distinguish between religious pacifists and religious selective objectors by granting to the former an exemption from military service while denying it to the latter. Indeed, it is perfectly clear that the Act tends toward an "establishment" of pacifist religions by discouraging religions which endorse the principle of selective objection. And the appellee is just as injured as the "religious" selective objector, for he is not—as the government asserts of all selective objectors—a "political" objector, or an objector whose views are essentially sociological views. It is not disputed that the appellee is a "conscientious" objector, that he was "as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion." In brief, the Act defines religion so as to exclude conscientious objectors such as the appellee who are not pacifists. Whatever the administrative merit of the prudential considerations advanced by the govern-

ment for defining religion in the Act more narrowly than does the First Amendment, the result is an impermissible distinction which violates the "establishment" clause.

### Argument.

#### I. THIS COURT HAS JURISDICTION OF THE APPEAL.

Appellee concurs with the government that the "arresting a judgment" clause of the Criminal Appeals Act, 18 U.S.C. 3731, confers jurisdiction upon this Court to review the decision of the district court on direct appeal. *United States v. Green*, 350 U.S. 415; *United States v. Bramblett*, 348 U.S. 503. Nothing in the district court's opinion suggests, even remotely, that the court based its decision on "independent grounds," *United States v. Hastings*, 296 U.S. 188, 193, rather than on the invalidity of the Act. It held:

"... this court holds that the free exercise of religion clause in the First Amendment and the due process clause of the Fifth Amendment prohibit the application of the 1967 draft act to Sisson to require him to render combat service in Vietnam. . . .

[Alternatively]:

"This court, therefore, concludes that in granting to the religious conscientious objector but not to Sisson a special conscientious objector status, the Act, as applied to Sisson, violates the provision of the First Amendment that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.'

"In the words of Rule 34, the indictment of Sisson 'does not charge an offense.'

"This court's 'decision arresting a judgment of conviction for insufficiency of the indictment . . . is based

upon the invalidity . . . of the statute upon which the indictment is founded' within the meaning of those phrases as used in 18 U.S.C. Section 3731." (A. 261, 263.)

The decision squarely holds the Act unconstitutional as applied to Sisson. There is no dispute as to the specific facts relied on by the district court as to the nature of appellee's beliefs (Brief, p. 33), so that in essence the case is here upon an agreed statement of facts. *United States v. Halseth*, 342 U.S. 277. The "essence of the ruling" of the district court, *United States v. Wayne Pump Co.*, 317 U.S. 200, 206-207, is that the Act is unconstitutional. This Court therefore clearly has jurisdiction of the "... appeal . . . taken by and on behalf of the United States . . . From a decision arresting a judgment of conviction for insufficiency of the indictment . . . based upon the invalidity . . . of the statute upon which the indictment is founded." 18 U.S.C. 3731.

In its order of October 13, 1969, the Court also requested discussion of the issue of jurisdiction under the "motion in bar" and "decision . . . setting aside, or dismissing" subdivisions of 18 U.S.C. 3731.

Despite the government's lengthy argument reaching the opposite conclusion (Brief, pp. 12-29), the appellee urges, albeit tentatively, that these two clauses may be viewed as also conferring jurisdiction of the appeal upon this Court.<sup>1</sup> The legislative history of the 1907 Act, 34 Stat. 1246, if it proves anything, proves that "... It [was] not proposed to give the Government any appeal . . . when the defendant is acquitted. . . ." (Quoted by the government at Brief, pp. 26-27.) Double jeopardy was the pri-

<sup>1</sup> Definitive assertions about a statute which Professor Wright finds "confusing" are not appropriate. 1 Wright, *Federal Practice and Procedure*, p. 399, n. 24 (1969).

mary concern, and in holding that the 1907 statute did not conflict with the Fifth Amendment, *United States v. MacDonald*, 297 U.S. 120, 127 (decided seven months after enactment of the Criminal Appeals Act), Mr. Justice Holmes cited *Kepner v. United States*, 195 U.S. 100, wherein, in a dissenting opinion, he had marked the limits of "jeopardy":

"But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree [citations omitted], or, notwithstanding their agreement and verdict if the verdict is set aside on the prisoner's exceptions for error in the trial. [Citations omitted.] He may even be tried on a new indictment if the judgment on the first is arrested on motion. . . ." 195 U.S. 100, 134-135.

As the Court of Appeals for the Second Circuit suggested in *United States v. Zisblatt*, 172 F. 2d 740, ". . . there is also a more than plausible argument for saying that . . . [the motion in bar] where the defendant had 'not been put in jeopardy,' . . . clause only meant that [the Supreme Court] should not intervene when the Constitution forbade intervention." 172 F. 2d 740, 742-743. With respect to the "decision . . . setting aside or dismissing" clause, the legislative history is not helpful—the government describes it as "confusing" (Brief, p. 25), but it is not unreasonable to conclude that "double jeopardy" as articulated in the then recent *Kepner* decision, *supra*, was a constitutional limit incorporated—by silence—into this clause: the legislators, naturally enough, appear to have been uncertain about the dimensions of the Fifth Amendment prohibition against double jeopardy and, therefore, having recognized the problem, left it up to the courts to resolve the issue. Had the draftsmen intended to adopt a formal rather than



a substantive test, it would have been a simple matter to provide that the "decision . . . setting aside" clause would be applicable, in a jury trial, only where a jury has not been impanelled, or, in a case tried by the court, only before the government began its presentation.

There remains the question whether the decision of the district court may be viewed as a decision dismissing the indictment or granting a motion in bar: since the decision is a complete bar to prosecution against the appellee, it yields the same result as would a decision granting a motion in bar. *United States v. Mersky*, 361 U.S. 431, 441, concurring opinion of Mr. Justice Brennan. And since the decision is based on "never-abandoned" issues (A. 249) first urged by the appellee in his pre-trial motion to dismiss and subsequently renewed by moving in arrest of judgment, it may also be proper to view the decision as one dismissing an indictment.

Overlap in the scope of the three clauses of 18 U.S.C. 3731 which provide for direct appeal to this Court presents no occasion for alarm. See remarks of Mr. Justice Brennan in the *Mersky* case, *supra*, at 443, n. 2. Indeed, given the purpose of the Criminal Appeals Act to create "the opportunity to settle important questions of law" in the court of final resort, *United States v. Mersky, supra*, at 435, it is hardly surprising that one or more provisions allow a direct appeal to this Court on the important question,

" . . . whether the government can constitutionally require combat service in Vietnam of a person who is conscientiously opposed to American military activities in Vietnam because he believes them to be immoral and unjust, that belief resting not upon formal religion but upon the deepest convictions and ethical commitments, apart from formal religion, of which a man is capable" (A. 249).

The question of the constitutional limits on the power of Congress to compel military service is properly before this Court.<sup>2</sup>

Also before this Court are the other never-abandoned issues, raised in the district court, that the Act is invalid:

"While Sisson has raised and not abandoned other issues, most of them have already been disposed of by earlier rulings in this case, *United States v. Sisson*, 294 F. Supp. 511, 515, 520 (D. Mass. 1968). Out of an abundance of caution this court repeats the following rulings already made, of which the first is peculiarly pertinent.

"November 25, 1968 this court's opinion held that *under present circumstances*, described in that opinion, *Sisson has the necessary standing to raise the issues he tenders*. See 294 F. Supp. 511, 512-513.

"The same opinion held that this court has no jurisdiction to decide the 'political question' whether the military actions of the United States in Vietnam require as a constitutional basis a declaration of war by Congress.

"November 26, 1968 in a second opinion this court held that it has no jurisdiction to decide the 'political question' whether American military operations in Vietnam violate international law. The holding is ex-

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<sup>2</sup> Appellee does not agree with the suggestion of the government (Brief, p. 36, n. 9) that if this Court has no jurisdiction of the appeal, the decision is nonetheless appealable to the Court of Appeals. For if this Court were held to lack jurisdiction, this would be so not because the district court did not hold the Act invalid—which it plainly did, but because the decision (for unimaginable reasons) would have been construed as a decision which granted neither a motion in arrest of judgment, nor a motion in bar, nor a motion to dismiss the indictment—and in that event, the decision would not be appealable at all.

panded and clarified in this court's order of December 3, 1968." (A. 249-250.)

It is open to this Court to inquire whether the judgment of the district court can be sustained upon rejected grounds which challenge the constitutionality of the Act. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 329-330; *United States v. Spector*, 343 U.S. 169, 172; *United States v. Kahriger*, 345 U.S. 22, 33, n. 14; *United States v. Grainger*, 346 U.S. 235, 239-240, n. 8; Hart & Wechsler, *The Federal Courts and the Federal System*, pp. 1365-1366 (1953); Wright, *Handbook of the Law of Federal Courts*, p. 413 n. 30 (1963); Stern & Gressman, *Supreme Court Practice*, p. 41 (1969).<sup>3</sup>

*United States v. International Union United Automobile, Aircraft & Agricultural Employment Workers of America*, 352 U.S. 567, does not preclude consideration of the constitutional issues presented by the appellee both in the district court and in this Court, for in that case the Court simply held that the constitutional issues would at least be refined, and perhaps be rendered unnecessary, by remanding the case for trial. In the present case, however, trial on the merits has already occurred, and the district court was clearly of the opinion that the constitutional issues raised by the appellee are ripe for determination by this Court:

"Hence any constitutional issue whatsoever which defendant alleged as a ground for having judgment arrested remains open in an appellate court . . .

". . . Therefore, 'an appeal may be taken by and on behalf of the United States . . . direct to the Supreme Court of the United States.'" (A. 253, 263-264.)

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<sup>3</sup> The government does not appear to contest this last point (Brief, p. 52, n. 17).

The government's position on some of the constitutional issues are set forth in its brief in the district court (A. 73-79). On the question of the power of Congress to conscript in times of peace, the government relies on this Court's decision in *United States v. O'Brien*, 391 U.S. 367, and other cases (Brief, p. 39, n. 10).

Appellee does not seek to open the whole case on this appeal: he does not tender objections to the form of the indictment nor does he argue that the indictment is insufficient on non-constitutional grounds.

The only issues sought to be presented are constitutional issues which are indispensable to a determination of the case. Moreover, the issues are important. Cf. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64; *Terminiello v. Chicago*, 337 U.S. 1.

## II. THE MILITARY SELECTIVE SERVICE ACT OF 1967 IS UNCONSTITUTIONAL.

### A. Congress has No Power to Conscript in Times of Peace.

The power of Congress to conscript in times of national emergencies such as the First and Second World Wars is not here questioned. Appellee assumes that *Arver v. United States*, 245 U.S. 366, was correctly decided. Appellee further assumes that Congress has the power to conscript in times of national emergencies such as the Civil War.

What appellee here contends is that the power to conscript exists only in times of such national emergencies, that it does not exist in times of peace. The phrase "times of peace" is here used to mean the absence of a "national emergency," not the absence of a declaration of war: the Civil War, an insurrection, was a national emergency; conversely, a war declared against Santo Domingo would not necessarily reflect a state of national emergency. Ordinarily, however, excepting such extraordinary circum-

stances, whether the Nation is at peace or at war for purposes of the power of Congress to conscript, will depend on whether or not Congress has declared war.

That the power of Congress to conscript for an undeclared foreign war is an open question is ably demonstrated in the dissenting opinion of Mr. Justice Douglas in *Holmes v. United States*, 391 U.S. 936, 938-949. Mr. Justice Stewart intimated in that case, as well as in *Mora v. McNamara*, 389 U.S. 934, that he also regards the question as presently unresolved.

Since the "undeclared foreign war" here involved is the Vietnam war, one preliminary point concerns the appellee's "standing" to raise questions involving that war. Strictly speaking, the character of the war is not relevant at this point in the brief, for appellee is simply challenging the power of Congress to conscript—and he certainly has standing to do that. Beyond that, appellee would not have been subject to induction were it not for the Vietnam war. The strength of the Army rose from 1,075,000 soldiers in 1965, to 1,463,000 soldiers in 1968.<sup>4</sup> The number of military forces assigned to Vietnam increased from 23,300 in 1964 to 536,100 in 1968, and the number of men conscripted for military service increased from 74,000 in 1963, to 340,000 in 1968.<sup>5</sup> The Selective Service newsletter for July 1969, U.S. Government Printing Office, reports at page 4 that, according to a recent letter from the Secretary of the Army, Stanley R. Resor, to the editor of the Washington Post, at least 2 out of every 3 men entering the Army either by induction or enlistment are assigned to a short-tour area such as Vietnam or Korea, and for the past two years the

<sup>4</sup> U.S. Bureau of the Census Statistical Abstract of the United States, 1969 (90th Ed.), Wash. D.C. 1969, p. 256, Table No. 374.

<sup>5</sup> Statistical Abstract of the United States, 1969, *op. cit.*, p. 256, Table No. 373 and p. 257, Table No. 377, respectively.



policy of the Army has been to assign soldiers to Vietnam who have had no previous Vietnam duty.

Thus, the causal relation between the Vietnam war and the induction order which the appellee refused to obey is abundantly clear. That order was issued pursuant to section 4(a) of the Act which purports to authorize conscription for an undeclared war:

"The President is authorized, from time to time, *whether or not a state of war exists*, to select and induct into the Armed Forces of the United States . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces. . . ." (Emphasis added.)

It follows that the appellee has standing to challenge the power of Congress to conscript, or by the Act to authorize conscription, for an undeclared foreign war. See also the district court's discussion on standing (A. 80-82), and Note, 83 Harv. L. Rev. 453, 462-464 (1969).

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No attempt can here be made to present an exhaustive discussion of the historical record in its full panoply. See generally, Friedman, Conscription and the Constitution: the Original Understanding, 67 Mich. L. Rev. 1493 (June 1969); Freeman, The Constitutionality of Peacetime Conscription, 31 Va. L. Rev. 40 (1944); Lawyers' brief printed in the Congressional Record at the request of Senator Wheeler, 86 Cong. Rec. 5206-5210; Black, The Selective Draft Cases—A Judicial Milepost on the Road to Absolutism, 11 Boston U. L. Rev. 37 (1931).

Nor will any attempt be made to analyze precedents, for the question is assumed to be an open one. Of historical interest is Chief Justice Taney's essay declaring the unconstitutionality of the Civil War draft statute. Taney,

Thoughts on the Conscription Law of the United States—Rough Draft Requiring Revision, 18 Tyler's Historical & Genealogical Magazine, 74 (1936)—the original manuscript is available at the Public Library for the City of New York.

Rather, the focus herein will be on the Conscription Act proposed by Secretary of War Monroe in 1814, two years after war against Great Britain had been declared, two months after Washington, D.C., was occupied and burned. Congress at that time not only rejected Monroe's plan, but in fact could not bring itself to enact a relatively mild law calling a part of the state Militia into service. The concreteness of the emergency (which appellee concedes would justify resort to conscription), together with the relatively short lapse of time from the adoption of the Constitution to the War of 1812, lend the debates and history of the proposed 1814 act substance and authority as aids in interpreting the constitutional provisions delegating to Congress the power to raise armies. (Since the "constitutional grants and limitations of power are set forth in general clauses . . . the process of construction is essential to fill in the details." *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 426.) After concluding the discussion of the 1814 proposal, the Federalist Papers will be examined briefly to show that they support the conclusions based on the history of that proposal.

### *The Monroe Proposal for Conscription.*

Twenty-five years elapsed between the adoption of the Constitution and submission of the first conscription bill to Congress on October 17, 1814. War against Great Britain had been declared on June 18, 1812, after Congress ". . . had increased the *authorized* Regular Army strength to 35,603 officers and enlisted men. In addition, the Pres-

ident had been authorized to mobilize 30,000 Federal Volunteers, 100,000 State Militia, and a handful of Federal Rangers, making a total authorized strength for the land forces of about 166,000 men."<sup>6</sup> As of June 5, 1812, the Regular Army numbered 6,744 men out of an authorized strength of 35,000. On January 20, 1813, the authorized strength of the Regular Army was increased to 58,354, but in February 1813 only 19,036 men were in regular service.<sup>7</sup>

"Recruiting for the Regular Army was as slow and discouraging as it had been during the Revolutionary War and for the same reasons. The greater attractiveness of short-term Militia tours with their high bonuses and the absence of any kind of compulsion to bring men into the service were handicaps which the Regular Army recruiting teams with small immediate \$16 bonuses and nebulous future land grants could not overcome."<sup>8</sup>

Secretary of War Monroe attributed the failure of recruiting for the Regular Army "... principally to the high bounty given for substitutes by the detached Militia. Many of the Militia detached for six months have given a greater sum for substitutes than the bounty allowed by the United States for a recruit to serve for the war."<sup>9</sup>

As of December 29, 1813, the total number of Federal Volunteers probably did not exceed 5,000 out of an authorized strength of 30,000. "It was easy to understand this reluctance to enlist for eighteen months [in the Federal Volunteers] or for five years [in the Regular Army] when

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<sup>6</sup> Kreidberg & Henry, *History of Military Mobilization in the United States Army 1775-1945*, Department of the Army Pamphlet No. 20-212, June 1955 (hereinafter cited as "Kreidberg"), p. 44.

<sup>7</sup> *Id.*, pp. 46-47.

<sup>8</sup> Kreidberg, *op. cit.*, p. 47.

<sup>9</sup> *American State Papers, Military Affairs*, I, p. 519.

glory, martial ardour, and financial enrichment could be satisfied by a two- or three-months tour in the Militia.”<sup>10</sup> Mobilization of the state Militia was hampered by the refusal of the governors of Massachusetts, Connecticut and Rhode Island to supply their assigned quotas of Militia for a war they considered unconstitutional and illegal.<sup>11</sup> Moreover, the utility of Militia for a war contemplating the invasion of Canada was limited, for serious questions were raised “. . . concerning the legality of the Federal Government’s employing Militia outside the United States or even outside its home state.”<sup>12</sup> A number of Militia in fact refused to cross the border into Canada.<sup>13</sup>

By April 1814, the British had defeated the French and were preparing to use their vast military forces against the United States, a threat which had the effect of stimulating enlistments:

“But men who would not take arms to invade Canada would do so when British redcoats appeared again as invaders in their own country, and by September the Regular Army climbed to about 35,000. About an equal number of men took the field in volunteer militia organizations on extended duty, so that late in the year the federal government and the states together could muster nearly 70,000 men in active service. This number was exclusive of those men who served for short periods against British raids and invasions in their own districts and who may have numbered in the hundreds of thousands.”<sup>14</sup>

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<sup>10</sup> Kreidberg, *op. cit.*, pp. 46, 47.

<sup>11</sup> *Id.*, p. 46.

<sup>12</sup> *Id.*, p. 47.

<sup>13</sup> Weigley, *History of the United States Army*, 1967, p. 120.

<sup>14</sup> *Id.*, p. 121.

Then came the defeat at Bladensburg on August 24, 1814, when the British ransacked Washington and burned the Capitol and the White House.

On September 23, 1814, the Senate resolved "That the Committee on Military Affairs be instructed to inquire into the state of preparations for the defense of the City of Washington, and whether any further provisions, by law, be necessary for that object."<sup>15</sup> The Chairman of the Senate Committee on Military Affairs thereupon inquired of Secretary of War Monroe "What are the defects in the present military establishment" and "What further provisions, by law, are deemed necessary to remedy such defects."<sup>16</sup> On October 17, 1814, Monroe responded by submitting four alternate plans for increasing the manpower of the Regular Army, the first of these plans suggesting resort to conscription.<sup>16</sup>

Thereupon, on October 19, 1814, the Senate Committee on Military Affairs inquired of Monroe "Whether any defects have been heretofore discovered in the existing provisions for filling the ranks of the regular army?"<sup>17</sup> And on October 24, 1814, the Committee inquired further: "Has such failure [in recruiting] arisen from any failure to place the requisite sums of money in the hands of the recruiting officers; or has it arisen from the indisposition of the citizens to enlist?"<sup>18</sup> The inquiry was referred to the Army Paymaster who, on October 26, 1814, informed Monroe: "That pressing calls for very considerable sums of money for the recruiting service have been made on him for about three months past, which he has been able

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<sup>15</sup> 1 American State Papers, Military Affairs, p. 514.

<sup>16</sup> *Id.*, pp. 514-517.

<sup>17</sup> *Id.*, p. 517.

<sup>18</sup> *Id.*, p. 518.



but partially to supply.”<sup>19</sup> On December 10, 1814, Congress enacted modified versions of Monroe’s fourth alternative plan, by doubling the land bounty from 160 to 320 acres, and of his third alternative plan, by exempting from Militia duty any person who at his own expense furnished a recruit willing to serve in the Regular Army for the duration of the war. 3 Stat. 147.

Turning now to Monroe’s proposals, reference is made in a preface to the existing emergency: “A nation contending for its existence against an enemy powerful by land and sea . . . It is the avowed purpose of the enemy to lay waste and destroy our cities and villages, and to desolate our coast. . . .”<sup>20</sup> The first plan is then described in six very brief paragraphs: The free male population between the ages of 18 and 45 is to be formed into classes of one hundred men, each class to provide four men for the duration of the war; if any class fails to provide its quota within a specified time, the quota of men is to be drafted from that class—but any man so drafted is permitted to furnish a substitute; land and money bounties are to be paid each draftee by assessing the taxable property of the inhabitants of the precinct wherein the class resides.<sup>21</sup>

The description of the draft plan is immediately followed by a long argument that the plan is constitutional, because “It would be absurd to suppose that Congress could not carry this power into effect, otherwise than by accepting the voluntary service of individuals,” and especially because, in Monroe’s view, Militia are no match for “regular, well disciplined troops.”<sup>22</sup> (Monroe’s pole-

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<sup>19</sup> *Id.*, p. 519.

<sup>20</sup> *Id.*, p. 514.

<sup>21</sup> *Id.*, p. 515.

<sup>22</sup> *Id.*, pp. 515-516.

mic against the Militia calls to mind his role in the Bladensburg disaster).<sup>23</sup>

Significantly, Monroe again stressed the existing crisis: "In proposing a draught [sic] as one of the modes of raising men, *in case of actual necessity, in the present great emergency of the country.* . . ." <sup>24</sup>

Monroe's second plan called for dividing the Militia into three age groups, 18-25, 25-32, and 32-45, and authorizing the President to call into service any portion of such groups for a period of two years. The plan left intact the prerogative of the states, under section 2 of the Act of May 8, 1792, 1 Stat. 253, to exempt any person from Militia duty. However, the plan did attempt to repeal the provisions of the Act of February 28, 1795, 1 Stat. 389, which authorized the President to call out the Militia to execute the laws of the Union, suppress insurrections and repel invasions, declaring that no member of the Militia called into service,

"... shall be compelled to serve more than three months after his arrival at the place of rendezvous, in any one year, nor more than in due rotation with every other able bodied man of the same rank in the battalion to which he belongs."

Under the 1792 Act, all men aged 18 to 45 not exempted by state law were required to be enrolled in the Militia. 1 Stat. 252. Thus, Monroe's second plan would have altered the 1795 Militia legislation in three respects: first, it contemplated use of Militia for purposes other than executing the laws, suppressing insurrections and repelling invasions (in his prefatory remarks, Monroe advises "push-

<sup>23</sup> "... Monroe disposing troops without authority and contributing to a situation in which three American battle lines were so deployed as to be incapable of supporting each other." Weigley, *op. cit.*, p. 122.

<sup>24</sup> 1 American State Papers, Military Affairs, p. 515.

ing the war into Canada''<sup>24</sup>); second, it extended the tour of active service to two years; and third, it eliminated the rotation requirement and contemplated using only "... the unmarried and youthful, who can best defend [the State], and best be spared. . . ." <sup>25</sup>

The third plan proposed to exempt from Militia duty every five men who furnished one recruit for the duration of the war, and the fourth plan proposed an increase in the land bounty of 100 acres for each year the war continued. As noted earlier, Congress enacted variations of the third and fourth plans by exempting from Militia duty each man who produced one recruit and by doubling the land bounty from 160 to 320 acres.

Debate, in both the House and Senate, was eloquent and passionate—and lengthy. The significant fact, however, is that Monroe's first plan was not adopted by either the House or the Senate. Indeed, the plan was not even endorsed either by the Senate Military Affairs Committee or by the House Military Committee. Instead, the Senate Committee proposed a hybrid of Monroe's first, second and third plans: the President was directed to call into service 80,430 Militia to serve for a period of two years, such Militia to be provided from groups of 25 men into which the entire Militia were to be classified; each group was to supply one Militia, either voluntarily or by draft, but three groups (75 men) would be exempted from such obligation for Militia duty if they furnished 2 recruits for the Regular Army for the duration of the war.<sup>26</sup> Militia thus called into service were not to cross national frontiers nor be used beyond the limits of the state of residence or of an adjoining state, "except that the militia from Kentucky and Tennessee may be required to serve in the

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<sup>24</sup> 1 American State Papers, Military Affairs, p. 515.

<sup>25</sup> *Id.*, p. 516.

<sup>26</sup> 28 Annals of Congress, p. 93.

defense and for the protection of Louisiana.”<sup>27</sup> Moreover, such Militia were to serve under officers appointed by the state governors.<sup>28</sup>

On November 22, 1814, the Senate approved this bill by a vote of 19 to 12,<sup>29</sup> overriding the extensive denunciations of Senators Varnum, Daggett, Mason, Gore, and Goldsborough.<sup>30</sup> The Annals of Congress do not report any lengthy defense of the bill in the Senate.

The bill as approved by the Senate was transmitted to the House on November 23.<sup>31</sup> The House amended the bill by deleting the territorial service restrictions for Militia,<sup>32</sup> reducing the length of service from 2 years to 1 year,<sup>33</sup> exempting conscientious objectors,<sup>34</sup> and authorizing the President to call directly on Militia officers in the event a governor refused to comply.<sup>35</sup> Daniel Webster's proposal for further reducing the length of Militia service to 6 months was defeated by one vote.<sup>36</sup> As amended, the bill passed the House on December 14 by a vote of 87 to 63.<sup>37</sup>

On December 24 managers for the House and Senate versions conferred and agreed to certain recommendations.<sup>38</sup> However, on December 27 the House refused to accept the recommendations of its conferees for a compro-

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*, p. 714.

<sup>29</sup> *Id.*, p. 109.

<sup>30</sup> *Id.*, pp. 58-70, 70-77, 77-91, 95-102, and 102-109, respectively.

<sup>31</sup> *Id.*, p. 635.

<sup>32</sup> *Id.*, pp. 713-714.

<sup>33</sup> *Id.*, pp. 775, 869.

<sup>34</sup> *Id.*, pp. 772-774.

<sup>35</sup> *Id.*, pp. 771, 869.

<sup>36</sup> *Id.*, pp. 882-883.

<sup>37</sup> *Id.*, p. 928.

<sup>38</sup> *Id.*, p. 136.

mise Militia duty tour of 18 months,<sup>39</sup> and for abandoning its amendment authorizing the President to go directly to Militia officers if any governor proved recalcitrant.<sup>40</sup> Upon receiving news of the position taken by the House, the Senate on December 28, 1814, tabled the bill<sup>41</sup> without acting on the recommendations of its conferees.

The debates in the House are more useful for present purposes because the views of proponents (Messrs. Duvall, Ingersoll, Moseley, Irving, Harris)<sup>42</sup> as well as opponents (Messrs. Miller, Shipherd, Stockton, Sheffey, Gaston)<sup>43</sup> are well reported. A notable exception is the omission of Webster's speech in opposition to the bill delivered on December 9.<sup>44</sup>

Turning to the debates, when the Senate bill was first considered by the House, on December 2, 1814, Mr. Troup denounced it and advocated support for the bill drafted by the House Military Committee which provided for "classification and penalty" rather than "classification and draft"—as proposed by the House Committee, each group would either provide a recruit for the Regular Army or pay a penalty, instead of providing a member of the Militia. The need, he stressed, was not for more Militia, but for more Regular Army soldiers, and in his view the Senate bill could not accomplish that objective: "But the bill proposes to furnish regular troops. How? by holding up *in terrorem* a militia classification and draught. Exempting every three classes which shall fur-

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<sup>39</sup> *Id.*, pp. 992-993.

<sup>40</sup> *Id.*, pp. 993-994.

<sup>41</sup> *Id.*, p. 141.

<sup>42</sup> *Id.*, pp. 800-807, 808-819, 830-833, 863-868, and 885-897, respectively.

<sup>43</sup> *Id.*, pp. 775-799, 819-830, 834-850, 850-859, and 922-928, respectively.

<sup>44</sup> Reproduced in The Selective Service Act, Special Monograph No. 2, Vol. III, pp. 157-163, U.S. Gov. Print. Off. 1954.



nish two regular soldiers, from the liability to furnish three militiamen." The scheme was bound to fail, maintained Troup, because the three classes would simply lure and provide to the Army the same two persons who otherwise would be recruited for the Army without the classes as intermediaries.<sup>45</sup> In response, Mr. Calhoun favored action on the Senate bill because, if the House approved, it would immediately become law. Moreover, he considered the differences between the House and Senate bills unimportant: "Should the bill reported by the gentleman prevail, it would give us either regulars or money; if this bill should pass, we shall have regulars or good militia. Both bills were calculated to produce regulars, if they could be obtained by purchase."<sup>46</sup> At this point, the House adopted Calhoun's position and proceeded to consider the Senate bill.

To the charge that Congress had no power to conscript, defenders of the bill replied that it was a Militia bill, not a conscription bill: Mr. Duvall, noting that "This bill has been called conscription, for the purpose of rendering it odious to the people," observed that it differed from existing Militia laws only in extending the tour of duty from 6 months to 1 year and in providing exemption from Militia duty as an inducement for recruiting Regular Army personnel.<sup>47</sup> Well, then, Militia could only be called into service to execute the laws, quell insurrections or repel invasions, argued the opponents. To that argument, proponents answered that the existing crisis was the best example of an invasion or imminent threat thereof and, for that reason alone, calling on the Militia was entirely appropriate.<sup>48</sup>

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<sup>45</sup> 28 Annals of Congress, pp. 705-711.

<sup>46</sup> *Id.*, p. 712.

<sup>47</sup> *Id.*, pp. 801-802; see also remarks of Mr. Rhea, *id.*, p. 897.

<sup>48</sup> *Id.*, Mr. Farrow, pp. 921-922; Mr. Harris, p. 886.

But all opponents and most proponents agreed that the bill was, in Mr. Gaston's phrase, "[a] contrivance for compelling the militia to find recruits for the regular army."<sup>49</sup> It was with that understanding, that regular troops and not Militia were sought to be raised, that the bill was debated.

Proponents of the bill relied on arguments of expediency: Mr. Irving observed that the British peace terms were not acceptable; that present means were not sufficient to raise "... an army adequate to the exigencies of the present crisis"; that having found the Militia ("the usual resource") unequal to the task, and having exhausted the possibilities of regular enlistments, it could not be the case that Congress was powerless to act "When our army is composed of a mere handful of men, and our treasury empty, so that it cannot provide for this gallant handful; when an enemy, powerful and active, is beating against our shores like the strong wave of the ocean. . . ." Irving bluntly asserted:

"... For my part, sir, I cannot find in the Constitution any one principle that militates against classification any more than against a draught, or conscription as some gentlemen call it. If there was, cases might occur, even then, to justify such a measure, as indispensable to self-defense, which, *while that necessity lasts*, supersedes all other laws but those of nature."<sup>50</sup> (Emphasis added.)

Mr. Ingersoll was impatient with the constitutional objections to the bill: "To be insensible to the extreme importance of time at this crisis is to be insensible to the crisis itself . . . As to the constitutionality of this measure, I refuse to argue it."<sup>51</sup>

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<sup>49</sup> *Id.*, p. 923.

<sup>50</sup> *Id.*, pp. 863-865, 868.

<sup>51</sup> *Id.*, pp. 808, 818.

The opponents, on the other hand, were anxious to argue constitutionality and they were most effective in attacking conscription—but less persuasive in attacking the bill which, after all, came so very close to a prototype militia bill. Mr. Stockton made the following points: “the rights of the militia were long known and universally acquiesced in, before the Government acquired its qualified jurisdiction over them”; the bill “deprives the militiaman of inherent fundamental rights; among these rights is the right not to be called except for the three purposes specified in Article I, Section 8—and the bill does not limit use of militia to those three purposes; the related right to be discharged when the exigency no longer exists—but the bill calls for a fixed tour of duty, whether of one or two years does not affect the principle; the right not to be called for duty except in the militiaman’s own state and contiguous states—but the House eliminated that restriction from the Senate bill; and the right to be called in rotation:

“All cannot be called forth at a time, or the country would become a desert. Hence the right of each man is, that he shall only be called into actual service in just rotation with all others. To declare by law that one class shall absolutely serve for one, two, or ten years, is entirely unjust and illegal. Substantially, it makes them regular soldiers.”<sup>52</sup>

Mr. Sheffey, as had Mr. Stockton, conceded the state of emergency:

“I am conscious of the awful crisis at which the affairs of this country have arrived; with him [Stockton], I admit that ruin is staring us in the face on every side.”<sup>53</sup>

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<sup>52</sup> *Id.*, pp. 844-846.

<sup>53</sup> *Id.*, p. 850.

But the crisis could not serve to justify imposing the "shackles of domestic slavery" on the people. Concerning Monroe's claim that the unqualified grant of power to "raise and support armies" carries with it the power of conscription, Sheffey argued:

Hence, the honorable Secretary infers, that you have the power to drag the citizen from the land of his birth, to be slaughtered on the plains of Canada. To force the father, the only support of a destitute family, and the son, the comfort of his aged parents, to undergo the miseries of a camp in a foreign country . . . I deny the right to convert a nation of freemen into slaves, under any pretense whatever . . .

The power to "borrow money" is as unrestrained as the power to "raise and support armies." . . . You have used every effort to borrow money, in the ordinary mode, "in vain" . . . In truth, the Government is on the verge of bankruptcy! Now, with this convenient power at your command, why not borrow money at the point of the bayonet? . . .

if the construction given to the Constitution by the Secretary of War is correct, you have the power to take by violence the ships of your merchants, and convert them into ships of war, and man your navy by impressment . . . The power "to provide and maintain a navy" is wholly unrestricted.

Continuing his analysis, Sheffey recalls that in the 46th number of the *Federalist*, Madison had written that federal encroachment upon the authority of a state would certainly lead to a unified show of strength by the states: "The same combination, in short, would result from an apprehension of the Federal, as was produced by the dread of a foreign yoke; and unless the projected innovation should be voluntarily renounced, the same appeal to a

trial of force would be made in the one case as was made in the other,"<sup>54</sup> and concluded that the ability of the states so to defend themselves was inconsistent with the notion that Congress could conscript Militia into the Regular Army.

Similarly, Mr. Ward reasoned:

"Congress have power to establish post offices and make post roads; but no person ever supposed that they could chain the citizens to wheelbarrows, and make them work against their will. The power of Congress to raise armies must be exercised in such a manner as is consistent with the people enjoying "the blessings of civil liberty." "<sup>55</sup>

"This bill also attacks the right and sovereignty of the State governments," accused Mr. Stockton. "Congress is about to usurp their undoubted rights—to take from them their militia":

"By this bill we proclaim that we have their men, as many as we please; when and where, and for so long a time as we see fit, and for any service we see proper."<sup>56</sup>

Mr. Ward also warned against yielding to expediency:

"The exigencies of the country, I agree, are pressing, and those who are influenced by an honest zeal to serve it, do not merit reproach. But every feeling of impatience at Constitutional restraint, and every propensity to assume unconstitutional power, are germs of tyranny, and ought to be destroyed in embryo . . .

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<sup>54</sup> *Id.*, pp. 850-856.

<sup>55</sup> *Id.*, p. 909.

<sup>56</sup> *Id.*, pp. 848-849.



To restrain the passions of men, and the aggressions of power, in such times, is the purpose for which Constitutional rules were made." <sup>57</sup>

But the fears of all opponents were perhaps best expressed by Senator Goldsborough:

"Mr. President, there is a foreboding that arises from all this which fills me with the deepest concern. The growth of tyranny, when once it begins, is strong and rapid. A few years past, and the name of conscription was never uttered but it was coupled with execration; last year, it found its way into a letter from the then Secretary of War to the chairman of the Military Committee, and it was then so odious that it was but little exposed to view. This year, we have conscription openly recommended to us by the Secretary of War in an official paper; and, worst of all, it finds champions and advocates on this floor). . . And why is all this to be done? The necessity of the crisis is offered as the plea; yes, sir, necessity, that blood-stained plea of tyrants, which has served every scheme of usurpation, to sacrifice the lives and liberty of men . . . Times of imminent peril and alarm, are periods when public liberty is most in danger, and it is difficult to decide whether he is the worthier patriot who goes to battle in defense of a nation's rights, or he who stands the faithful sentinel over the Constitution in times of general effervescence, to guard it from violation and abuse." <sup>58</sup>

In appraising the significance of the above, the following facts ought to be borne in mind: more than two years elapsed between the declaration of war in 1812 and the first

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<sup>57</sup> *Id.*, p. 905.

<sup>58</sup> *Id.*, p. 108.

proposal for a conscription bill, and one may doubt whether the proposal ever would have been submitted but for the humiliation suffered at Washington, D.C., in late August, 1814; Wellington's armies, fresh from victory against the French, were to be used against the United States; the British navy controlled the seas; the American army needed recruits desperately; the country was on the verge of bankruptcy. Notwithstanding all these factors, Monroe's conscription plan was not reported out of either the House or Senate Military Committees. And the Senate bill, which was at least colorably a Militia bill although intended indirectly to stimulate Regular Army recruiting, was not enacted. Although the principal sections of the bill were approved by both Senate and House, the propriety of the bill hung in such a delicate balance—even for those who favored it, that the House could not bring itself to concede a 6 months extension in the Militia tour of duty; to Mr. Farrow, who had voted to approve the bill, such an extension would have changed the "militia character of the bill" and, as so amended, the bill "would possess the conscriptive character."<sup>59</sup> In voting for the bill, it cannot be said that Mr. Farrow had voted for the constitutionality of conscription—even in a time of dire national emergency.

But appellee concedes the power of Congress to conscript in times of national emergency such as the war of 1812. No inference may be drawn, however, that an extraordinary power delegated to Congress to meet extraordinary national needs also exists and may be used in ordinary circumstances. The historical record is not ambiguous: in times of peace, Congress is powerless to conscript men into the armed forces. The same conclusion may be drawn from an analysis of the *Federalist*, written by the advocates of a strong, centralized government.

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<sup>59</sup> *Id.*, p. 992.

*The Federalist Papers.*

Congressional power to conscript in peace time is not consistent with Madison's emphasis on the relative military weakness of the proposed government as contrasted with the supposed military strength of the states.

In numbers 45 and 46 of the Federalist, Madison addresses himself to the question whether "... the whole mass of [the powers transferred to the federal government] will be dangerous to the portion of authority left in the several states." In number 46, he writes as follows:

"But ambitious encroachments of the federal government, on the authority of the State governments . . . would be signals of general alarm . . . Plans of resistance would be concerted . . . The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other. But what degree of madness could ever drive the federal government to such an extremity . . .

*The only refuge left for those who prophesy the downfall of the State governments is the visionary supposition that the federal government may previously accumulate a military force for the projects of ambition.* The reasonings contained in these papers must have been employed to little purpose indeed, if it should be necessary now to disprove the reality of this danger. That the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both; that the traitors should, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and

the people of the States should silently and patiently behold the gathering storm, and continue to supply the materials, until it should be prepared to burst on their own heads, must appear to everyone more like the incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism. Extravagant as the supposition is, let it however be made. Let a *regular army*, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the State governments, with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a *standing army* can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an *army* of more than twenty-five or thirty thousand men. To these would be opposed a *militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence.* It may well be doubted, whether a *militia* thus circumstanced could ever be conquered by such a proportion of *regular troops.*" (Emphasis added.)

The clear import of Madison's words is that the states have nothing to fear since they will always have military superiority over the federal government. In the first place, asserts Madison, the federal government cannot accumulate a regular army (standing army, army, or regular troops—the words are used interchangeably) of threatening propor-

tions except over a long period of time, spanning many congressional elections. The dynamics of growth of an army which Madison describes do not bear the earmark of conscription—which can augment an army in a very short space of time. Rather, they bear the earmark of a painstaking process for recruiting volunteers into the regular army, with long enlistments, and an ever-increasing budget which must be reviewed at least every two years.

Even if a federal army of menacing size is accumulated, adds Madison, the states can rely on their militia, armed and officered by men of their own choosing. This supposed balance of military forces would be a callous fraud if Congress had the power to conscript the militia into the regular army.

Even in case of national emergency, it would be difficult to reconcile Madison's explanations with the existence of congressional power to conscript. In times of peace, it is not possible.

The conclusion is buttressed by examining others of the Federalist papers. In number 45, Madison explains that, with few exceptions, the Constitution simply carries over the powers already contained in the Articles of Confederation, and does so without expanding them:

"If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained. *The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the articles of Confederation.*



*The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them. The change relating to taxation may be regarded as the most important. . . .* (Emphasis added.)

Comparison of the Articles of Confederation with the Constitution indeed shows a close correspondence.<sup>59A</sup>

The Constitution delegates to Congress a very limited power over state militia which the Confederate Congress did not possess. But, according to Madison, the power of Congress over armies, being one of the powers already vested in the Confederate Congress, is not enlarged under

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<sup>59A</sup> Constitution, Article I, Section 8, *11th clause*: "To declare War, grant Letters of Marque and Reprisal, and makes Rules concerning Captures on Land and Water," has its counterpart in the 1st paragraph of Article IX: "The United States in Congress assembled, shall have the exclusive right and power of determining on peace and war . . . of granting letters of marque and reprisal in times of peace . . . of establishing rules for deciding in all cases, what captures on land and water shall be legal. . . ." *12th clause*: "To raise and support Armies, but no appropriation of Money to that Use shall be for a longer Term than two Years," has a counterpart in the 5th paragraph of Article IX: "The United States in Congress assembled shall have authority . . . to agree upon the number of land forces, and to make requisitions from each State for its quota . . . which requisition shall be binding. . . ." *13th clause*: "To provide and maintain a Navy," has its counterpart in the fifth paragraph of Article IX: ". . . to build and equip a navy." *14th clause*: "To make Rules for the Government and Regulation of the land and naval Forces," has its counterpart in the 4th paragraph of Article IX: "The United States in Congress assembled shall have the sole and exclusive right and power of . . . making rules for the government and regulation of the said land and naval forces. . . ." The significant exception is the absence of a counterpart for the militia clauses (15th and 16th): no power was delegated to the Confederate Congress with respect to the militia, but by the 4th paragraph of Article VI of the Articles of Confederation, ". . . every State shall always keep up a well regulated and disciplined militia. . . ."

the Constitution. He cites the change in the power of taxation as perhaps the most important.

The Confederate Congress had no power whatsoever to conscript. Indeed, when raising land forces for the Continental Army, the states tried at all cost to avoid resorting to conscription from the militia, as illustrated in Thomas Jefferson's letter of May 16, 1777, to John Adams:

"Our battalions for the continental service were some time ago so far filled as rendered the recommendation of a draught from the militia hardly requisite, and the more so as in this country *it ever was the most unpopular and impracticable thing that could be attempted*. Our people, *even under the monarchical government*, had learnt to consider it as the last of all oppressions."<sup>60</sup> (Emphasis added.)

Can it seriously be contended that the Constitution delegated to Congress "the most unpopular and impracticable" power that could be attempted, a power considered "the last of all oppressions" even under the monarchy? And if the power—to conscript *in times of peace* no less, had been delegated by the Constitution, would it have constituted such a trivial change from the power of the Continental Congress over armies as not to be worthy of mention by Madison? *Even in the midst of the Revolution*, the power was feared and despised. Can it then be assumed that the power to conscript *in times of peace* was delegated to Congress *sub silentio*?

The contributions to the Federalist written by the staunchest federalist of the time, Alexander Hamilton, lead to the same conclusion—Congress has no peacetime conscription power. In number 23, after noting the weakness

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<sup>60</sup> Adams, *Life and Writings of John Adams*, Vol. 9, Boston (1854), p. 465.

of the requisition scheme used under the Articles of Confederation, Hamilton asserts:

"... the Union ought to be invested with full power to levy troops; to build and equip fleets; and to raise revenues which will be required for the formation and support of an army and navy, *in the customary and ordinary modes practiced in other governments.*" (Emphasis added.)

It is easily demonstrable that at the time Hamilton wrote, it was neither customary nor ordinary to raise a *regular army* by conscription. Nor can the practice be inferred from resort to compulsory service for the militia, because "The local and temporal limitations sharply distinguish it from professional military forces." Mahon, "Military Service," 15 *Encyclopaedia Britannica* 453 (1969).

Hamilton's use of the word "levy" in the above quotation should not be misunderstood: in number 22 of the *Federalist*, Hamilton refers to the Revolutionary War experience, when the States found it difficult to meet their quotas for the Continental Army:

"The hope of still further increase [in bounties] afforded an inducement to those who were disposed to serve to *procrastinate their enlistment*, and disinclined them from engaging for any considerable periods. Hence, *slow and scanty levies of men*, in the most critical emergencies of our affairs . . . Hence, also *those oppressive expedients* for raising men which were upon several occasions practiced, and which nothing but the enthusiasm of liberty would have induced the people to endure." (Emphasis added.)

Thus, Hamilton not only defines the word "levy" to mean recruiting enlistees, but he distinguishes it from the occa-

sional use of conscription by the states during the Revolutionary War. Consequently, when, in number 23 of the *Federalist*, Hamilton advocated "full power to levy troops . . . in the customary and ordinary modes," he certainly was not suggesting that Congress should have the power of raising armies through the "oppressive expedient" of conscription. As he expresses it in number 30 of the *Federalist*, he is advocating ". . . the power of providing for . . . the expense of raising troops"—professional, volunteer troops.

In numbers 24 through 29 of the *Federalist*, Hamilton argues the need for standing armies, small, professional, as to relieve the Militia of the necessity for manning frontier garrison posts (Number 24), armies which cannot seriously threaten the sovereignty of the states who have available and can depend on their more numerous Militia.

None of these writings make sense, unless as a calculated attempt to deceive, if the Constitution is interpreted as delegating to Congress the power to conscript in times of peace.

What these writings and the debates of the constitutional convention show is that the Federalists were fighting to overcome the strong prejudice against peace time armies: for instance, John Trenchard's well-known polemic against standing armies "History of Standing Armies" was quoted in connection with the Boston Massacre. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Harvard 1967) pp. 35-36, 116; David L. Jacobson, Ed., *The English Libertarian Heritage, from the Writings of John Trenchard and Thomas Gordon* (Bobbs-Merrill 1965) pp. 215-230. The standing armies advocated by the Federalists were to be professionals—as was customary, and they were to be supplemented in times of stated emergency by the

Militia. Nothing suggests that the Federalists, considered, let alone proposed, that Congress have the power to conscript in peacetime.

*B. At Most, the Constitution Delegates to Congress a Power of Conscription to "Raise and Support Armies" to the Extent that Such Power is "Necessary and Proper."*

- 1. The Act as administered is being used not "to raise and support armies," for which conscription is not now needed, but to control civilian behavior, thus exceeding Congress's delegated power and depriving civilians of liberty without due process.*

As demonstrated above, even the persons who asserted the existence of congressional power to conscript, as an adjunct to the delegated power to raise and support armies, qualified the assertion by emphasizing that it was an "emergency" power, a power whose inferred existence was demanded by the necessity and urgency of the crisis because all other means had been exhausted—as Monroe himself expressed it ". . . in case of actual necessity, in the present great emergency . . ." (see p. 29 above) or as Irving put it, ". . . a measure indispensable to self-defense, which, while that necessity lasts, supersedes all other laws . . ." See p. 34 above.

The power is coextensive with the necessity, and it lapses when the emergency does. In 1814, at a peak of the national crisis, the hardiest exponents of federal power claimed nothing more. Indeed, no one claimed a greater scope for the power until after the Second World War.

But assuming, *arguendo*, that Congress has a power to conscript in times of peace, that power obviously is not unlimited: for instance, Congress has no power to compel



those who are drafted to spend the rest of their lives on active duty in the armed forces, or to conscript the entire male population into the army for the next two years. Yet these limitations are not expressed in the Constitution—of course, the underlying power is itself not expressed. These and other limitations arise from the nature of the power which, by assumption, the Constitution delegates to Congress.

The framers of the Constitution certainly delegated no more power to conscript than was needed to meet national crises. It follows, as an independent limitation on the delegated power, that, so long as the ranks of the regular army can be filled by volunteers, an emergency cannot be said to exist, and Congress is powerless to conscript. If a less burdensome alternative exists, Congress is not free to deprive young men of their liberty.

“Necessity” is not here used to refer to matters involving congressional judgment. Neither the “need” for the number of men presently in the armed forces nor the “need” for the length of service exacted from these men is here questioned. The existence of limitations on, rather than the exercise of, the power is at issue.

Congress has not made a finding of necessity. All the Military Selective Service Act of 1967 provides on this question is: “The Congress declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation.” Section 1(b), 50 U.S.C. App. 451(b). This declaration is identical to that contained in the Act’s predecessors, the Universal Military Training and Service Act (1951) and the Selective Service Act of 1948.

The matter of an all-volunteer army received considerable attention in the course of the hearings held April 12-19, 1967, by the Senate Committee on Armed Services with re-

spect to S. 1432. (The transcript of these hearings will hereafter be referred to as "Hearings.")

The Assistant Secretary of Defense in Charge of Manpower, Thomas D. Morris, testified as follows:

"As to pay incentives, we estimated that the additional cost to recruit and maintain an all-volunteer active force of 2.7 million men—the pre-Vietnam level—would range between \$4-\$17 billion annually, depending upon employment conditions in the Nation from year to year and other variable factors. Our best estimate, assuming a 4 percent general unemployment level, is an annual cost of \$8 billion." Hearings, p. 60. (Emphasis added.)

Senator Edward M. Kennedy submitted a summary report based on hearings he had chaired during the weeks of March 20 and April 3, 1967, in the Subcommittee on Employment, Manpower and Poverty. The report states:

"The Department of Defense has estimated the additional cost of maintaining a volunteer army at from \$4-\$17 billion a year. . . . It was Professor Friedman's view that these figures were not correct, and that *a volunteer army might even be less costly.*" Hearings, p. 175. (Emphasis added.)

Senator Kennedy, in opposing the all-volunteer concept, further testified as follows:

"We heard from an articulate proponent of the volunteer army, Prof. Milt Friedman, of the University of Chicago, did indicate that inflexibility was one of the problems. I wonder how much you would have to pay a young person in this country to go fight in the patties of Vietnam. *The best cost estimates of the proponents of the volunteer army envision a \$5-\$17-*

*billion* program in peacetime. This was one figure cited by *Walter Oi*, a noted economist from the University of Washington. It has been estimated by the defense department to be \$17 billion." Hearings, p. 182. (Emphasis added.)

See also Hearings, p. 105. Prior to these Hearings, a conference on the draft had been held at the University of Chicago, December 4-7, 1966.<sup>61</sup>

Walter Oi submitted a detailed economic analysis of the cost of an all-volunteer force,<sup>62</sup> based largely on research conducted while he served as a consultant for the Office of the Assistant Secretary of Defense from June 1964 to July 1965. Professor Oi concludes his paper as follows:

"If the current draft law is extended into the decade ahead, it is projected that only 38.5 percent of qualified males will be required to staff a mixed force of 2.65 million men. Since the draft assures adequate supplies of initial accessions, military pay can be kept at artificially low levels. Many servicemen on their first tour can correctly be called reluctant participants who

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<sup>61</sup> Participants included, among others, economist Milton Friedman; Lt. Gen. Lewis B. Hershey, National Director of the Selective Service System, and his assistant, Col. Dee Ingold; Bernard D. Karpinos, Special Assistant for Manpower, Office of the Surgeon General, Department of the Army; Rep. Robert B. Kastenmeier; Sen. Edward M. Kennedy; Timothy McGinley, Special Assistant in the U.S. Department of Labor; Sen. Maurine B. Neuberger; economist Walter Y. Oi; Bradley H. Patterson, Jr., Executive Director of the National Advisory Commission on Selective Service; Rep. Donald Rumsfeld; and Harold Wool, Director for Procurement Policy, Office of the Assistant Secretary of Defense in Charge of Manpower. The papers submitted at the conference, as well as a transcript of the discussions at the conference, are reproduced in *Tax, The Draft* (U. of Chicago, 1967).

<sup>62</sup> This paper is reproduced in *Tax, supra*, pp. 221-251.

pay substantial implicit taxes because they were coerced to serve. A conservative estimate of the economic cost (excluding rents) is \$826 million—the amount of compensation which would have induced these men to enter on a voluntary basis. If all recruits received the first-term pay needed to attract the last draftee, the opportunity cost of acquiring new accessions would exceed \$5.3 billion.

“An all-volunteer force offers a polar alternative to the draft. With its lower personnel turnover, a voluntary force of the same size could be sustained by recruiting only 27.5 percent of qualified males. The budgetary payroll cost would, however, have to be raised by \$4 billion per year.

“It should be emphasized that the figures appearing in this paper represent my estimates. The two crucial ingredients are (1) the supply curve of voluntary enlistments in the absence of a draft and (2) required accessions as determined by the assumed force strength and personnel turnover. Complement supply curves were estimated from cross-sectional data on estimated voluntary enlistment rates.

“The new retention profiles used to derive gross-flow demands for an all-volunteer force generated an age structure of the force which closely resembles those of smaller professional armies in Canada and the United Kingdom. In the light of the data examined, I am reasonably confident of my cost estimates, at least for the assumed force strength of 2.65 million men.

“If peacetime military requirements necessitate larger active-duty forces, all costs necessarily climb. In order to sustain a force strength of 3.3 million men on a voluntary basis, required accessions must be increased by roughly 30 percent. The additional budgetary cost of a voluntary force over a mixed force of

the same size would be in the neighborhood of 8 to 10 billion dollars. The high budgetary cost of a voluntary force is not the only relevant consideration. If men are procured by a draft, the high turnover of draftees implies that over 60 percent of qualified males would be demanded to maintain a mixed force of 3.3 million men. Annual accessions under a draft would rise by more than 50 percent of the mixed-force case.

"The alternative of a voluntary manpower procurement system has been criticized because of its inflexibility to changing military demands. If, for example, force strengths must be increased from 2.65 to 3.3 million men within a single year, it would be difficult to accomplish this through higher pay. The criticism is, in my opinion, valid for changing demands of this magnitude. However, a voluntary procurement system could be designed to accommodate minor fluctuations in stock demands—say from 2.65 to 3.0 million men. Entry level and career military pay could be set to provide excess supplies of enlistment applicants and servicemen who wish to reenlist. The number of men accepted (either as new recruits or as reenlistments) would be determined by the stock demand, meaning the force strength objective. In response to a short-run increase in strength objectives, the services would accept more of the excess supplies. The criticism of inflexibility is valid only if 'peacetime' military demands are so highly variable that they involve increasing force strengths by more than 10 percent in a single year.

"The defense budget for active-duty military personnel is obviously lower with a draft. *However, the conscription of military personnel simply substitutes implicit taxes levied on those men who serve for ex-*



*PLICIT taxes on all citizens to finance the higher payroll of an all-volunteer force. The real economic cost of maintaining a defense establishment is partially concealed because these implicit taxes never appear in the defense budget. The real opportunity cost of acquiring military personnel must include the full economic cost of the draft.*"<sup>63</sup> (Emphasis added.)

Can it be thought constitutionally permissible to finance the cost of national defense by "implicit taxes" on the conscripted few as a substitute for explicit taxes on all citizens?

The 1967 Senate Hearings establish a range for the cost of an all-volunteer army, from nothing at all to \$17 billion, with the most probable estimates narrowing the range to \$4 to \$8 billion, or a fraction of the defense budget and from 2% to 4% of the national budget. Does Congress have the power to finance space exploration, or development of ABM or MIRV or jumbo supersonic aircraft—at the expense of persons conscripted for the armed forces?

Nor is the problem attributable to a dearth of manpower. Indeed, as Burke Marshall, Chairman of the National Advisory Commission on Selective Service, testified, the problem is how to select 110,000 out of 730,000 available men.<sup>64</sup> Actually, the figure 730,000 is misleading, for the selection process begins long before that figure is reached: all males above the age of 26 are excluded from the available manpower pool, and all women regardless of age are excluded;<sup>65</sup> in 1968, of 20,829,000 registrants aged 18½ to 26, fully 5,189,000 were disqualified as physically or men-

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<sup>63</sup> *Id.*, pp. 246-247.

<sup>64</sup> Hearings, *op. cit.*, p. 126.

<sup>65</sup> Who Serves When Not All Serve, Report of the National Advisory Commission on Selective Service (Gov. Print. Off. 1967) suggests "the possibility of making more military positions available to women" (p. 11).

tally unfit; 4,126,000 were deferred on the basis of fatherhood or hardship; 2,200,000 had student deferments; 949,000 were enrolled in the National Guard, Reserves or ROTC; 471,000 had critical occupation or agricultural deferments; and 424,000 were "unclassified."<sup>66</sup> The random lottery selection process recently adopted, even if it be thought that the element of chance in selecting 110,000 from 730,000 is an improvement, does nothing to improve the arbitrary and capricious system which reduces the number in the pool down to 730,000, a system roundly condemned by the Marshall Commission report.<sup>67</sup> At least Monroe's 1814 subscription plan, discussed earlier in this brief, had the advantage of taxing every member in the national manpower pool, and did so at a time when the army's ranks were depleted and the treasury empty.

At the present time, the treasury is full and volunteers are available, but the government does not want to pay the additional cost. Why? Two answers appear from the 1967 Senate Hearings: first, it is claimed that an all-volunteer army is not sufficiently flexible, and second, a "mercenary" army is rejected as socially undesirable. On the matter of flexibility, Mr. Morris clarified the nature of the Act in his testimony before the Senate Committee on Armed Services:

"Senator Stennis. Now is this bill written to cover conditions when we are at war or when we are at peace?

"Mr. Morris. Both, sir. That is the great virtue of the present act . . . the great flexibility it has had.

" . . . "<sup>68</sup>

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<sup>66</sup> Statistical Abstract of the United States: 1969, *op. cit.*, p. 260, Table 383.

<sup>67</sup> Report of the National Advisory Commission on Selective Service, *op. cit.*

<sup>68</sup> Hearings, *op. cit.*, p. 89.

In short, the Act is designed to provide for emergencies. But as Burke Marshall testified, "... the view of those arguing for reliance on a voluntary force are really hypothesizing ... standby authority for conscription in the event of any sudden national need."<sup>69</sup> It is one thing to enact a statute to be used in case of national emergency. It is quite another matter to use that statute in the absence of an emergency. So that there is no merit in the flexibility argument: according to Prof. Oi (see above quotation), a completely volunteer force could accommodate annual variations of 10% in manpower (and only once in the past ten years has an increase in manpower exceeded 10%—and then only in the Army, not the other branches of the armed forces. This occurred in 1965-1966);<sup>70</sup> in addition, Reserve and National Guard units may be called into active duty if the need arises; finally, the conscription statute need not be discarded—it can be used when the emergency occurs. This nation has repeatedly demonstrated its ability to mobilize large numbers of troops when the occasion required it. It can do so again.

As for the problem of an army composed of mercenaries, the danger arises not from the rank and file but from the officers, and the danger remains whether the ranks are filled by conscripts or by volunteers. The two safeguards suggested 180 years ago when the question of "standing armies" troubled the Framers of the Constitution are equally relevant today: keep the army small and the state militia well-trained.

The danger in permitting conscription to be used for ambiguous social ends, as opposed to raising an army in case of national emergency, is that it converts a nation where

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<sup>69</sup> Hearings, *op. cit.*, p. 125.

<sup>70</sup> Statistical Abstract of the United States: 1969, *op. cit.*, p. 256, Table 374.

peace and individual liberty are the norms into a nation obsessed with war mentality, it metamorphasizes Athens into Sparta. Nor is the parallel fanciful, as the following excerpts from the amazing Selective Service System "Channelling" memorandum, July 1, 1965 (Gov. Print. Off. 899-125) illustrates:

"One of the major products of the Selective Service classification process is the channelling of manpower into many endeavors, occupations, and activities that are in the national interest. . . .

"The opportunity to enhance the national well being by inducing more registrants to participate in fields which relate directly to the national interest came about as a consequence, soon after the close of the Korean episode, of the knowledge within the System that there was enough registrant personnel to allow stringent deferment practices employed during war time to be relaxed or tightened as the situation might require. Circumstances had become favorable to *induce registrants*, by the attraction of deferment, to matriculate in schools and pursue subjects in which there was beginning to be a national shortage of personnel. These were particularly in the engineering, scientific and teaching professions . . . .

"In the Selective Service System the term '*deferment*' has been used millions of times to describe the method and means used to attract to the kind of service considered to be most important, the individuals who were not compelled to do it. *The club* of induction has been used to drive out of areas considered to be less important to the areas of greater importance in which deferments were given, the individuals who did not or could not participate in activities which were considered to be essential to the defense of the Nation.

The Selective Service System anticipates further evolution in this area. . . .

"Since occupational deferments are granted for no more than *one year at a time*, a process of periodically receiving current information and repeated review assures that every deferred registrant continues to contribute to the overall national good. . . .

"In the less patriotic and more selfish individual it engenders a sense of fear, uncertainty, and dissatisfaction which motivates him, nevertheless, in the same direction. He complains of the *uncertainty* which he must endure; he would like to be able to do as he pleases; he would appreciate a certain future with no prospect of military service or civilian contribution, but he complies with the needs of the national health, safety, or interest—or is denied deferment.

"Throughout his career as a student, *the pressure*—the threat of loss of deferment—continues. It continues with equal intensity after graduation. . . .

"The device of *pressurized guidance*, or channelling, is employed on Standby Reservists. . . .

"If he attempts to enlist at 17 or 18 and is rejected, then he receives none of the *impulsion* the System is capable of giving him. If he . . . is not rejected until . . . age 23, he has felt some of the pressure but thereafter is a free agent.

"This contributed to the establishment of a new classification of 1-Y (registrant qualified for military service only in time of war or national emergency). This classification reminds the registrant of his ultimate qualification to serve and preserves some of the benefit of what we call channelling. . . .

"From the individual's viewpoint, he is standing in a room which has been made *uncomfortably warm*.



Several doors are open, but they all lead to various forms of recognized, patriotic service to the Nation. Some accept the alternative gladly—some with reluctance. The consequence is approximately the same.

“Delivery of manpower for induction, the process of providing a few thousand men with transportation to a reception center, is not much of an administrative or financial challenge. It is in dealing with the other millions of registrants that the System is heavily occupied, *developing more effective human beings in the national interest.*” (Emphasis added.)

“The club . . . fear . . . uncertainty . . . pressure” consciously used to “develop more effective human beings.” Does it matter whether these human beings are also happy? No. “Some accept the alternative gladly—some with reluctance.” It’s all the same, as far as the “System” cares, so long as they comply.

Such a blatantly undemocratic “System” can be sanctioned under Congress’s power to raise armies only if our nation is viewed as an armed camp, our people as so much war materiel to be marshalled in the “national interest.” One is tempted to speculate whether the current rebellion of this country’s youth is attributable to the unnatural pressures of this System.

But what is the constitutional mandate for this “arrogance of power”? Where is it written that the government may compel a young man to become an engineer or, if he prefers to become a teacher of literature or the arts, to compel him to become a soldier? <sup>71</sup> What if too many young men are “channelled” into engineering only to discover, af-

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<sup>71</sup> Hearings, *op. cit.*, p. 114 set forth the then current list of “critical occupations.”

ter investing many years of their lives, that some are not needed because there is a surplus of engineers? And, if needed, what of the frustrations and unhappiness of having been pressured into that occupation? Does not the "pursuit of happiness" presuppose the freedom to choose the direction of one's own life? To abridge freedom of choice when a young man is 18½ years old is to effectively deprive him of any meaningful choice, but of course it is precisely because the pressure is to be effective that the System applies it at that point.

Presumably, the statutory authority for the administrative scheme is section 1(e) of the Act which provides:

"The Congress further declares that adequate provision for national security requires maximum effort in the fields of scientific research and development, and the fullest possible utilization of the Nation's technological, scientific, and other critical manpower resources."

This provision first appeared in the Selective Service Act of 1948. The Act, as the government conceded at the 1967 Senate Hearings, is designed for war. It should be restricted to that use. Military defense spending, exclusive of Southeast Asia, increased in each of the years 1965 through 1969. *In addition* to that budget, military defense outlays in Southeast Asia rose from \$103,000 in 1965 to \$29 billion in 1969 alone.<sup>72</sup> Financial ability is clearly not the obstacle to an all-volunteer force. No one in the government has suggested that there exists a state of national emergency. In the present circumstances, it is unwarranted and unconstitutional to apply the Act to conscript manpower instead of recruiting it from the labor market.

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<sup>72</sup> Statistical Abstract of the United States; 1969, *op. cit.*, p. 246, Table 357.

Reviewing the legislative and social history of the draft in the United States since 1940, one commentator concluded:

"Thus in 1967 coercion was perfunctorily accepted and the argument from equality laid quietly to rest with the ghost of American voluntarism . . . At least for the moment, another ideal once central in American thought seemed of profound irrelevance."<sup>73</sup>

It may be true that in 1967 coercion was perfunctorily accepted by Congress. It is at least dubious that coercion was accepted, as a matter of principle, by the youth who are to be coerced.<sup>74</sup> And this Court should make it plain that it does not accept the "profound irrelevance" of the Constitution. This Court should declare unconstitutional the peacetime application of the Act.

2. *The Act as administered is being used to "raise and support armies" for a war which violates both domestic and international law.*

Long ago, this Court recognized the "high power," and duty, conferred upon it, of determining whether congressional and presidential acts "are beyond the *limits of power* marked out for them respectively by the constitution of the United States." (Emphasis added.) *Luther v. Borden*, 7 How. 1, 47. The vitality of that obligation has been re-

<sup>73</sup> The history of conscription in this country since 1940 is traced in Gillam, *The Peacetime Draft: Voluntarism to Coercion*, Yale Review, vol. LVII, No. 4 (Summer 1968).

<sup>74</sup> The evil in permitting the continued existence of peacetime conscription is that, after a generation, it becomes the norm for older persons who themselves were subjected to its coercion. By thus isolating one segment of the people, the young, the government could, if permitted, systematically undermine every concept of individual liberty which the Constitution was intended to protect.

affirmed time and again. In the landmark decision *Ex parte Milligan*, 4 Wall. 2, this Court held:

*"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions be suspended during any of the great exigencies of government."* 71 U.S. at 120, 121. (Emphasis added.).

More recently, this Court held in *United States v. Robel*, 389 U.S. 258:

*"However, the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 426 . . . this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . ."* (Emphasis added.)

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, this Court declared unconstitutional the executive order of

President Truman authorizing seizure of the steel mills on the excuse that a strike would imperil national defense. The Court emphasized that the order could not be sustained either:

"... as an exercise of the President's military power as Commander in Chief of the Armed Forces, ... or because of the several constitutional provisions that grant executive power to the President." 343 U.S. at 587.

In a concurring opinion, Mr. Justice Jackson elaborated:

"What the power of command may include, I do not try to envision, but I think it is *not a military prerogative*, without support of law, *to seize persons or property because they are important or even essential for the military and naval establishment.*" 343 U.S. at 646.

Also writing a separate concurring opinion, Mr. Justice Frankfurter underlined the importance of judicial intervention:

"The judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government." 343 U.S. at 597.

The decision in *Reid v. Covert*, 354 U.S. 1, provides one more illustration of the dominance of law in our constitutional scheme. Cf. *Hamilton v. Kentucky Distilleries Co.* 251 U.S. 146, 156; *Powell v. McCormack*, 395 U.S. 486. And *Baker v. Carr*, 389 U.S. 186, 211, teaches that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."



In light of the hallowed tradition of judicial review in our history, it is difficult to understand any justification for holding the legality of the Vietnam war to be a political question. What appellee seeks to establish is not error of judgment on political issues. He seeks to establish flagrant and outrageous violations of domestic and international law, ranging from the callous disregard for the doctrine of separation of powers as applied to the President and Congress, to egregious violations of binding treaties and rules of warfare. If there is to be any safeguard against "tyranny or disaster," the phrase used by the Senate Foreign Relations Committee, the immense military power wielded by the President must be matched by careful scrutiny to ensure its proper exercise.

Appellee's standing with respect to the legality of the Vietnam war has been discussed above. The argument of the government that appellee does not have standing is based on the possibility that he will not be ordered to Vietnam. But that argument ignores the substantial possibility that appellee *will* be shipped to Vietnam, and that possibility—coupled with the impossibility of obtaining meaningful judicial review<sup>75</sup>—if it materializes, certainly endows appellee with a sufficient "personal stake" in the question, within the meaning of that phrase as repeatedly used by this Court:

"The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker v. Carr*, 369 U.S. 186, 204."

<sup>75</sup> See note, 83 Harv. L. Rev. 453, 462-464.

*Flast v. Cohen*, 392 U.S. 83, 99. Indeed, the prison term which menaces appellee in itself goes far towards inducing the "concrete adverseness" referred to by the Court.

Furthermore, the system prescribed by Congress avoids unnecessary disruption; the inductee is given one chance—his last chance—to refuse service, or to step forward and take a definitive oath of obedience. At this moment, the moment foreseen by Congress for judicial review, see 50 U.S.C. App. § 460 (b)(3), appellee asserted his constitutional right not to be drafted for service in an illegal war.

Thus, the issue of legality is justiciable and appellee has standing to litigate it.<sup>76</sup>

Discussion of the issue of legality will be divided into two segments: (1) United States participation in the Vietnam war is the result either of the President's usurpation of Congress's war powers, or of disregard of the constitutionally required separation of executive and legislative powers by both the President and Congress; (2) United States participation in the Vietnam war violates binding treaty obligations as well as international law.

### *The Undeclared War in Vietnam*

The President's unilateral commitment of the United States to war in Vietnam has received wide public attention. Some of the more useful essays analyzing the President's usurpation of Congress's war powers in the Vietnam case include Merlo J. Pusey, *The Way we go to War* (Houghton-Mifflin, 1969), and Francis D. Wormuth, *The Vietnam War: The President versus the Constitution* (Center for the Study of Democratic Institutions, Santa Barbara, California, 1968). Also helpful are Joseph C.

<sup>76</sup> See generally Velvel, *The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 Kan. L. Rev. 449 (1968).

Goulden, Truth is the First Casualty (Rand McNally, 1969)—analyzing in detail the Gulf of Tonkin incident, and Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1771 (1968). Most valuable of all are the transcript of hearings held by the Senate Foreign Relations Committee, August 16, 17, 21, 23 and September 19, 1967, on S. Res. 151, U.S. Commitments to Foreign Powers (Gov. Print. Off. 1967), and the report of the Senate Foreign Relations Committee based on those hearings, Calendar No. 118, Report No. 91-120, National Commitments (April 16, 1969). These last two documents will hereafter be referred to as "National Commitments Hearings" and "National Commitments Report" respectively.

The concluding paragraph of the National Commitments Report, p. 34, is an eloquent statement of the issue before this Court:

"Already possessing vast powers over our country's foreign relations, the executive, *by acquiring the authority to commit the country to war*, now exercises something approaching absolute power over the life or death of every living American—to say nothing of millions of other people all over the world. There is no human being or group of human beings alive wise or competent enough to be entrusted with such vast power. Plenary powers in the hands of any man or group threaten all other men with tyranny or disaster. Recognizing the impossibility of assuring the wise exercise of power by any one man or institution, the American Constitution divided that power among many men and several institutions and, in so doing, limited the ability of any one to impose tyranny or disaster on the country. *The concentration in the hands of the President of virtually unlimited authority over matters of*

*war and peace has all but removed the limits to executive power in the most important single area of our national life. Until they are restored the American people will be threatened with tyranny or disaster."* (Emphasis added.)

One is reminded of another President, another war nearly two decades ago, also in Southeast Asia, when Mr. Justice Jackson warned:

"Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642.

Sinister and alarming it certainly is, that the President has enlarged his dominance over the internal affairs of the country by committing our armed forces to Vietnam.

The analysis of what has happened and how it all happened is contained in the National Commitments Report, as supplemented by the National Commitments Hearings transcript. On August 16, 1967, Professor Ruhl Bartlett of the Fletcher School of Law and Diplomacy of Tufts University, testified:

"The most important and the most obvious [conclusion] is that the positions of the executive and legis-

lative branches of the Federal Government in the area of foreign affairs have come very close to reversal since 1789, a change that has been gradual in some degree but with acceleration during the past half century and breakneck speed during the last 20 years. The President virtually determines foreign policy and decides on war and peace, and the Congress has acquiesced in or ignored, or approved and encouraged this development."<sup>77</sup>

Professor Bartlett then concluded:

"... the greatest danger to democracy in the United States and to the freedom of its people and to their welfare—as far as foreign affairs are concerned—is the erosion of legislative authority and oversight and the growth of a vast pyramid of centralized power in the Executive branch of the Government . . . The arguments of immediacy, expertness, superior information, and greater wisdom are equally fallacious as bases for enlarged Presidential authority. The framers of the Constitution bequeathed to the American people a great heritage, that of a constitution, federal, representative government, with its *powers limited in scope and divided among its three separate branches*, and this system was devised *not because it would produce efficiency or world dominion, but because it offered the greatest hope of preventing tyranny.*"<sup>78</sup> (Emphasis added.)

On August 23, 1967, Senator Ervin testified:

"I have concluded that a distinction must be drawn between defensive warfare and offensive warfare.

<sup>77</sup> National Commitments Hearings, pp. 19-20.

<sup>78</sup> *Id.*, p. 21.



There is no doubt whatsoever that the President has the authority under the Constitution and, indeed, the duty, to use the armed forces to repel sudden armed attacks on the Nation. *But any use of armed forces for any purpose not directly related to the defense of the United States against sudden armed aggression, and I emphasize the word 'sudden', can be undertaken only upon congressional authorization.*" (Emphasis added.)<sup>79</sup>

In a written statement to the Committee, Senator Dominick observed that, first, Senate review of Presidential appointments has become ineffective; second, Senate advice and consent to treaties has become perfunctory, and after the fact; third, the power to declare war has become irrelevant because of the President's assertion of inherent powers as Commander-in-Chief; and fourth,

"The responsibility imposed upon Congress to raise and support armies has been seriously undermined for the reason that once the President has committed our Armed Forces into conflict Congress has no alternative but to provide for their effective support. . . . Since 1941, we have been involved in two major conflicts and numerous instances of American military personnel being sent into hostile areas without prior consultation with Congress. The most recent of such incidents occurred last month and involved our sending C-130 jet aircraft into the Congo. There is serious room to question whether this action could be justified under the constitutional authority of the President, as Commander-in-chief, to order American military personnel to foreign soil to repel attack, protect the lives and property of U.S. citizens, or to fulfill United States Treaty obligations."<sup>80</sup>

<sup>79</sup> *Id.*, p. 194.

<sup>80</sup> *Id.*, pp. 236-237.

Congressman Findley submitted a statement in which he analyzed the provisions of the SEATO treaty of 1954, together with its legislative history including testimony by John Foster Dulles before the then Senate Foreign Relations Committee, and concluded that the provisions of the treaty had not been complied with in connection with Vietnam.<sup>81</sup>

On behalf of the administration, Under Secretary Nicholas deB. Katzenbach testified that declarations of war are outmoded,<sup>82</sup> thereby echoing Hamilton's identical pronouncement 180 years earlier.<sup>83</sup> Then he asserted that the SEATO treaty, when considered together with the Tonkin Gulf resolution amounted to the "functional equivalent" of a declaration of war. At that point, the Chairman of the Committee interjected:

"They did not ask for a declaration of war. They do not have one yet.

"Mr. Katzenbach. That is true in the very literal sense of the word.

"The Chairman. It is quite true, not only literally, but in spirit. You haven't requested and you don't intend to request a declaration of war, as I understand it."<sup>84</sup>

Subsequently in his testimony, Mr. Katzenbach conceded that the Tonkin Gulf resolution had not been based upon the SEATO treaty at all because, at the time it was requested

<sup>81</sup> *Id.*, p. 230.

<sup>82</sup> *Id.*, p. 81.

<sup>83</sup> "As the ceremony of a formal denunciation of war has of late fallen into disuse . . .", *The Federalist*, Number 25.

<sup>84</sup> National Commitments Hearings, p. 82.

by the President, there was no evidence of invasion by North-Vietnam into South Vietnam.<sup>85</sup>

In the course of colloquy with Mr. Katzenbach, Senator Fullbright indicated that he had viewed the Tonkin Gulf resolution as involving a very limited response to a temporary attack "... as opposed to a full-fledged war like the one which we are in"; that the resolution had been drafted by the Executive, not by Congress; and that the resolution had been adopted in the heat of the moment "... largely without any consideration."<sup>86</sup> Senator Gore confirmed that he had never understood the resolution as amounting to a decision for war:

"I did not vote for the resolution with any understanding that it was tantamount to a declaration of war."<sup>87</sup>

Senator Gore then established that, as the administration interpreted the Tonkin Gulf resolution, it had a blank check to do whatever it thought necessary, despite the absence of any meaningful consideration by Congress:

"Senator Gore. You have confirmed that Congress would have had great difficulty foreseeing the bombing of North Vietnam. I would have had difficulty foreseeing the commitment of ground troops, combat troops, particularly in view of the repeated statements of President Johnson in contravention of such a policy. But if the Congress would have had difficulty foreseeing the bombing of targets within 10 miles of China, as I say and as you now confirm, do you not think it incumbent upon the President to seek the advice and consent of the Congress before undertaking such action?

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<sup>85</sup> *Id.*, p. 87.

<sup>86</sup> *Id.*, pp. 82-83.

<sup>87</sup> *Id.*, p. 88.

"Mr. Katzenbach. No; I do not, Senator. . . ." <sup>88</sup>

Thereafter, Senator Cooper, having established with Mr. Katzenbach that the first section of the Tonkin Gulf resolution—approving any action taken to repel an attack on United States Forces—added nothing to the power which the President already had in that respect, turned to the second section:

"Senator Cooper. The second section granted broad powers. It did give to him the authority to take any necessary steps that he thought proper, including the use of armed forces, to resist aggression against South Vietnam. I did raise the question on the floor that day that *we were not under the SEATO treaty authorizing President Johnson in advance to engage our forces in South Vietnam and to attack ports and cities in North Vietnam.*" (Emphasis added.) <sup>89</sup>

In fact, Senator Cooper conceived the problem to have occurred long before the Tonkin Gulf incident, when without congressional authorization, President Kennedy had committed 14,000 troops to Vietnam in 1962, and President Johnson had increased the number to 25,000 in 1964. His concern was that, step-by-step, the President on his own had moved the United States to within 10 miles of war with China. <sup>90</sup>

Senator Percy was the next witness, and he suggested a procedure requiring the President to itemize, on an annual basis, each foreign commitment sought to be financed:

"1. It would require the President to distinguish between commitments of economic assistance and military commitments including armed intervention, thus clarifying the policy of his administration . . .

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<sup>88</sup> *Id.*, pp. 93-94.

<sup>89</sup> *Id.*, p. 107.

<sup>90</sup> *Id.*, p. 108.

"2. It would enable the Congress, and particularly the Senate, to express itself on the validity of commitments before they are extended and especially before any of them are implemented by force. . . ." <sup>91</sup>

This, of course, is the complete answer to any suggestion that appropriations by Congress, without itemization, amount to ratification of military decisions taken by the President. Cf. *Ex parte Endo*, 323 U.S. 283. This is a consideration apart from the practical point made by Senator Dominick (quoted above), "... once the President has committed our Armed Forces into conflict Congress has no alternative but to provide for their effective support."

The Committee Report itself carefully traces the historical development of Congress's war powers, noting that the framers had vested these powers in Congress and (quoting Hamilton) that the President was little more than a "supreme" commander of the army and navy.<sup>92</sup> The report then underscores the adherence of the early Presidents to the allocation of power incorporated in the Constitution, and traces the history of the ever-growing assertion of Executive power which reaches its crescendo in the past twenty years.<sup>93</sup> The report considers at some length President Truman's commitment of troops in Korea without obtaining prior Congressional approval, and notes the impatience demonstrated by Secretary of State Acheson with the constitutional question of separation of powers:

"We are in a position in the world today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour."<sup>94</sup>

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<sup>91</sup> *Id.*, pp. 112-113.

<sup>92</sup> National Commitments Report, pp. 7-11.

<sup>93</sup> *Id.*, pp. 10-15.

<sup>94</sup> *Id.*, pp. 17-19.



Then the report focuses upon the Tonkin Gulf resolution:

"In the case of the Gulf of Tonkin resolution, the Senate responded to the administration's contention that the effect of the resolution would be lost if it were not enacted quickly. *The desired effect was a resounding expression of national unity and support for the President at a moment when it was felt that the country had been attacked . . . [T]herefore . . . the exact words in which it expressed those sentiments were not of primary importance. . . .* When Congress declared war on Japan on December 8, 1941, it expected that the full military power of the United States would be brought to bear against Japan. When Congress adopted the Gulf of Tonkin resolution, it had no such expectation. Its expectations were shaped by events outside of the formal legislative record, notably the national election campaign then in progress, in which President Johnson's basic position as to Vietnam was expressed in his assertion that '*. . . we are not about to send American boys 9,000 or 10,000 miles away from home to do what Asian boys ought to be doing for themselves.*' It is difficult, therefore, to credit Under Secretary of State Katzenbach's contention that the Gulf treaty, was the 'functional equivalent' of a declaration of war."<sup>95</sup> (Emphasis added).

The report also notes that President Johnson subsequently said that the Tonkin Gulf resolution was not "*. . . necessary to what we did and what we're doing.*"<sup>96</sup> After reviewing America's far-flung commitments through treaties and executive agreements,<sup>97</sup> the report concludes with a plea for restoration of the constitutional balance.<sup>98</sup>

<sup>95</sup> *Id.*, pp. 22-23.

<sup>96</sup> *Id.*, p. 24.

<sup>97</sup> *Id.*, pp. 26-30.

<sup>98</sup> *Id.*, pp. 30-32.

As an ominous footnote to the report, a letter from the Department of State—commenting on the proposed Senate resolution on foreign commitments, asserts, “In any event, a resolution could not change the constitutional powers of the President.”<sup>99</sup>

Plainly, the Tonkin Gulf resolution does not amount to congressional authorization of the Vietnam war. Dr. Albert Levitt, an authority on constitutional law, testified before the Committee:

“The Tonkin Bay Resolution does not purport to give, and does not give, any power or authority . . . Whatever it may mean, it cannot possibly mean that Congress has abdicated and given all its powers over the armed forces of the United States to the President and that the Congress is prepared to do whatever the President tells it to do.”<sup>100</sup>

If Dr. Levitt is wrong, then it is equally plain that the resolution is an unconstitutional delegation of Congress’s power to the President. *Panama Refining Co. v. Ryan*, 293 U.S. 388; *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495.

Early in the history of this Court, in *Bas v. Tingy*, 4 Dall. 37, the power of Congress to authorize a limited war as well as to declare a general war was recognized. The several opinions, written by Justices Washington, Chase and Patterson are unanimous on this question. Chief Justice Marshall later confirmed the constitutional allocation of powers, writing for the Court in *Talbot v. Seeman*, 1 Cranch, 1, “The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides . . . Congress

<sup>99</sup> *Id.*, p. 35.

<sup>100</sup> National Commitments Hearings, *op. cit.*, p. 282.

may authorize general hostilities . . . or partial hostilities . . .” 1 Cranch, 1, 28. See also *Little v. Barrene*, 2 Cranch, 170.

The Constitution has not been amended in this particular since 1800 when *Bas v. Tingy* and *Talbot v. Seeman* were decided, obsolete though the government may view its provisions to be. The time has come for this Court to restore constitutional government in our country, to reaffirm the exclusive power of Congress in the initiation of war, and to declare that the Vietnam war was initiated and is being pursued in total disregard of constitutional requirements.

#### *Treaties and International Law.*

An exhaustive canvass of international law as it bears on the Vietnam war is obviously not feasible in this brief. Basically, appellee relies on and adopts the arguments in John H. E. Fried, Rapporteur, Vietnam and International Law: The Illegality of United States Military Involvement (O'Hare Books, 1967), which was admitted into evidence at appellee's trial below for the limited purpose of establishing the reasonableness of his belief that the Vietnam war is illegal. The major conclusions reached by the distinguished group comprising the "Consultative Council Lawyers Committee on American Policy Towards Vietnam" are set forth in the record (A. pp. 18-19). See generally Richard A. Falk, Ed., *The Vietnam War and International Law* (Princeton 1968).

A convenient beginning framework for the present analysis is provided by a Memorandum from the Department of State, Office of the Legal Adviser, dated March 4, 1966, entitled *The Legality of United States Participation in the Defense of Viet-Nam*, which is printed in the Congressional Record for March 10, 1966, 112 Cong. Rec. 5274-5279. This

document will hereafter be referred to as the "State Department Memorandum."

The State Department Memorandum is divided into four principal arguments, and a conclusion. The fourth argument is entitled "The President has Full Authority to Commit United States Forces in the Collective Defense of South Vietnam," and argues:

*"The grant of authority to the President in article II of the Constitution extends to the actions of the United States currently undertaken in Vietnam. In fact, however, it is unnecessary to determine whether this grant standing alone is sufficient to authorize the actions taken in Vietnam. These actions rest not only on the exercise of Presidential powers under article II but on the SEATO treaty—a treaty advised and consented to by the Senate—and on actions of the Congress, particularly the joint resolution of August 10, 1964. (Emphasis added.)"*

The Memorandum's argument that the President's power under Article II to "repel sudden attacks" extends to attacks on South Vietnam is founded on a blatant distortion of history.<sup>101</sup> Reliance on the Tonkin Gulf resolution is un-

<sup>101</sup> The State Department Memorandum states that the views of the early Presidents in our nation's history "... are highly persuasive evidence as to the meaning and effect of the Constitution," but distorts that history in suggesting, for instance, that the "undeclared war" with France (1798-1800) was conducted without congressional authorization. Wormuth, *op. cit.*, pp. 4, 6-10, observes, "It would be difficult to find a bolder or more childish attempt at deception," and cites at least 7 separate acts of Congress specifically directed at the undeclared war with France, and the decision in *Bas v. Tinny*, *supra*, where the Supreme Court held that Congress had authorized the limited war against France. Adherence by Presidents Jefferson and Madison to the Constitution's exclusive grant to Congress over the decision to take the nation from a state of peace to a state of war is described by Wormuth, *supra*, at pp. 9-10.

justified for reasons already expressed above,<sup>102</sup> as well as other reasons which cannot be discussed within the space

<sup>102</sup> The memorandum itself supports the above description of the Tonkin Gulf resolution as an expression of sentiment rather than an authorization to commit  $\frac{1}{2}$  million ground troops to Vietnam. It quotes Senator Nelson's proposed amendment to the resolution, that Congress approves the

"... President's declaration that the United States, seeking no extension of the present military conflict, will respond to provocation in a manner that is 'limited and fitting'. *Our continuing policy is to limit our role to the provision of aid, training assistance, and military advice*, and it is the sense of Congress that, except when provoked to a greater response, we should continue to attempt to avoid a direct military involvement in the Southeast Asia conflict." (Emphasis supplied.)

The memorandum also quotes the response of Senator Fullbright to this proposed amendment,

"The Senator has put into his amendment a statement of policy that is unobjectionable. However... the House is now voting on this resolution... I cannot accept the amendment and go to conference with it, and thus take responsibility for delaying matters... I regret that I cannot do it, even though *I do not at all disagree with the amendment as a general statement of policy.*" (Emphasis added.)

In the course of hearings before the Senate Preparedness Investigating Subcommittee, Senator Stennis told Secretary Rusk:

"I really do not think we need a legal adviser to tell us what the Tonkin Gulf Resolution means or what the Constitution means when it talks about declaring war... It seems to me that you stand on mighty thin ice if you rely upon the Tonkin Gulf Resolution as a constitutional basis for this war."

Preparedness Investigating Subcommittee of the Senate Armed Services Committee, *Worldwide Military Commitments, Part I*, Hearings, August 1966, p. 68.



limitations of this brief.<sup>103</sup> The SEATO treaty, 6 U.S. Treaties 81, TIAS No. 3170 (1955), does not provide a basis for the United States participation in the Vietnam war.

Before turning to Article IV, paragraph 1 of the SEATO treaty, which is the provision relied upon by the government, it is important to emphasize that the treaty was not intended to alter the obligations imposed by the United Nations Charter. Article VI of the treaty makes this clear:

"The Treaty does not affect and shall not be interpreted as affecting in any way the rights and obligations of any of the Parties under the Charter of the United Nations or the responsibility of the United Nations for the maintenance of international peace and security."

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<sup>103</sup> The circumstances surrounding the purported attacks by North Vietnamese torpedo gunboats against the Maddox and Turner Joy, which were not revealed to the Senate at the time the President asked for the Resolution, are analyzed in detail in Goulden, *Truth is the First Casualty*, 1969; see chapters 5 and 8, in particular, which indicate that the commander of the vessels, Commander Herrick, had sent a telegram indicating that the attacks perhaps did not occur ("... Review of action makes many reported contacts of torpedoes fired appear doubtful ... Freak weather effects and overeager sonarman may have accounted for many reports. No actual sightings by Maddox. Suggest complete evaluation before any further action," p. 152); that the American ships had for several days operated within the 12 mile territorial waters limit claimed by North Vietnam, p. 227; that the American vessel was an electronic "spy" vessel equipped with radar capable of simulating an attack against North Vietnam for the purpose of evoking—and analyzing—the North Vietnamese response; that South Vietnam was simultaneously conducting so-called "De Soto" patrols with gunboats bombarding North Vietnam—in the immediate vicinity of the American vessels—as Senator Morse stated to Secretary Rusk: "The fact that you were electronically invading ... North Vietnam, while at the same time ... the South Vietnamese boats were going in to make their attack, puts us ... where the North Vietnamese ... would see some interrelation." (P. 223.)

The State Department Memorandum, moreover, expressly relies on the supremacy clause of the Constitution to establish that SEATO is the supreme law of the land: "Under Article VI of the United States Constitution, 'all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.' " The same logic leads to the unavoidable conclusion that, by the SEATO treaty, the overriding "obligations" of the United States under the United Nations Charter were reconfirmed.

Article IV of the treaty provides in pertinent part:

"1. Each Party recognizes that aggression by means of *armed attack* in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger *in accordance with its constitutional processes*. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.

"2. If, in the opinion of any of the Parties, the inviolability or the integrity of the territory or the sovereignty or political independence of any Party in the treaty area or of any other State or territory to which the provisions of paragraph 1 of this Article from time to time apply is threatened in any way other than by armed attack or is affected or threatened by any fact or situation which might endanger the peace of the area, the Parties *shall consult immediately in order to agree on the measures which should be taken for the common defense.*" (Emphasis added.)

The Parties to the Treaty were Australia, France, New Zealand, Pakistan, the Republic of the Philippines, the King-

dom of Thailand, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. As designated, the treaty area includes the States of Cambodia and Laos, and the territory under the jurisdiction of the "State of Vietnam."

Now, much has been written about the technical meaning of the phrase "armed attack," and whether, as defined, it brings to life paragraph 1 of Article IV, rather than paragraph 2—which requires unanimous agreement by the Parties to the Treaty as to measures to be taken. In part, the question is related to an accommodation with the provisions of the Charter of the United Nations, 59 Stat. 1031, particularly Article 2(4) which prohibits the threat or use of force in a manner inconsistent with the purposes of the United Nations, Articles 39, 42 and 44 which designate the Security Council as the body charged with responsibility for determining the existence of an act of aggression and for deciding appropriate measures to be taken in response, including military sanctions, and Article 51, which provides:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an *armed attack* occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." (Emphasis added.)

The nature and timing of the supposed armed attack claimed by the government to have triggered the collective self-defense mechanism was described in testimony by former Secretary of State Rusk on January 28, 1966, before the Senate Foreign Relations Committee:<sup>104</sup>

"From November of 1964 until January of 1965 they moved the 325th Division of the North Vietnamese

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<sup>104</sup> The transcript of these hearings is reproduced in Fulbright, *The Vietnam Hearings* (Vintage 1966), and page references will be to this book.

Army down to South Vietnam. There was no bombing at this time. Now, this is an aggression by means of an armed attack."<sup>105</sup>

Secretary Rusk's definition of the phrase "armed attack" does not conform with the definition given by eminent authorities that, consistent with the objective of Article 51, *supra*, the discretion of a state to claim self-defense is confined to instances when the necessity of action is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Jessup, *A Modern Law of Nations*, 163-164 (1948); Kelsen, *Law of the United Nations*, 798-800 (1950). Even if taken to be true,<sup>106</sup> Rusk's statement fails to take adequate account of United States troop build-up in July of 1964 together with the illegal<sup>107</sup> reprisal attack which destroyed the North Vietnamese navy (thereby incapacitating North Vietnam from intercepting the South Vietnamese "De Soto" patrols, see above n. 103) as well as its oil storage depot at Vinh.<sup>108</sup> In summary, the action of the North Vietnamese cannot properly be described as amounting to "armed attack," as opposed to the lesser form of aggression or interference contemplated by paragraph 2 of Article IV of the SEATO treaty.

An entirely separate question, involved in determining whether the phrase "armed attack" is at all applicable, is whether the Vietnam war is in reality a civil war, as opposed to an invasion by North into South Vietnam. The

<sup>105</sup> *Id.*, p. 44.

<sup>106</sup> Cf. Report submitted by Senator Mansfield to the Senate Foreign Relations Committee on January 6, 1966, entitled "The Vietnam Conflict: The Substance and the Shadow."

<sup>107</sup> See e.g. on illegality of retaliatory attacks, Higgins, R., *The Development of International Law through the Political Organs of the United Nations*, 217 (1963).

<sup>108</sup> For an account of the chronology of the retaliatory attacks, see Goulden, *supra*, 42-43, 233-235.

demarcation line between North and South is strictly "... provisional and should not in any way be interpreted as constituting a political or territorial boundary."<sup>109</sup> Indeed, part III, D, of the State Department Memorandum undertakes to prove that "South Vietnam was justified in refusing to implement the election provisions of the Geneva Accords" on the ground that elections would not have been "free." In 1966, Senator Fulbright responded to Secretary Rusk's explanation about prospects for free elections having been poor in 1955 by quipping, "Now, they have always been poor, and will be for a hundred years, won't they? That was no news to you. I mean, this was a device to get around the settlement, was it not?"<sup>110</sup> But the character of the war as a civil war was most convincingly demonstrated by Senator Aiken—on the basis of the Department of Defense's own statistics:

"According to the Department of Defense statistics, there have been a total of 63,300 infiltrators [armed and unarmed] from North Vietnam since 1960, and during that period, again according to the Department of Defense, we have killed 112,000 Viet Cong. The year-end strength of the Viet Cong was 225,000 excluding the North Vietnamese troops. It makes a total of 337,000 Viet Cong including those killed in action. Now, if you subtract that from the total of 63,300 infiltrators from the North, that still leaves 273,700 Viet Cong recruited and trained in the South, according to the Department of Defense statements. Does this indicate that there are civil war aspects to this struggle, and

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<sup>109</sup> Paragraph 6 of the Final Declaration of the Geneva Conference on the Problem of Restoring Peace in Indo-China, 161 Brit. & For. State Papers 359 (1954).

<sup>110</sup> Fulbright, *op. cit.*, p. 40.



that the appeal of the Vietcong to his fellow countrymen in South Vietnam is quite strong!"<sup>111</sup>

If there remains any considerable doubt that an "armed attack" did not occur within the meaning of Article 51 of the United Nations Charter, it might be appropriate to remand the case for determinations of fact on these questions, for the interpretation of treaty provisions is a function which ultimately can only be performed by this Court—on the basis of an adequate record, of course.

But assuming, *arguendo*, that an armed attack did occur, it is certain that the obligation of the government to act (in the language of the SEATO treaty's Article IV. 1. "... in accordance with its constitutional processes") was not observed:

"Gore: ... Going back to the SEATO Treaty, where are the constitutional processes with respect to the United States that we agreed to follow in SEATO?

"Rusk: The processes which have been determined through consultation between the President and the leadership, for example, such processes as the resolution of the Congress of August, 1964."<sup>112</sup>

And so the quest for justification of the Vietnam war, under outstanding treaty obligations, comes full circle back to the sufficiency of the Tonkin Gulf resolution as congressional authorization for the war. In 1954, in testifying before the Senate Foreign Relations Committee, Secretary of State John Foster Dulles denied that the SEATO treaty obligated the United States to intervene in the event of communist subversion in Vietnam, "... we have no undertaking to put it down; all we have is an undertaking to consult together as to what to do about it."<sup>112</sup> Noteworthy is the

<sup>111</sup> *Id.*, p. 260.

<sup>112</sup> Foreign Commitments Report, *supra*, p. 28.

fact that Article IV. 1. of the SEATO treaty provides that armed attack in the treaty area would "endanger the peace and safety" of each party, whereas, by contrast, the NATO treaty of April 4, 1949 (ratified July 25, 1949) provides in Article 5,

"The Parties agree that an *armed attack* against one or more of them in Europe or North America *shall be considered an attack* against them all; and consequently they agree that, if such an armed attack occurs, each of them . . . *will* assist the Party or Parties so attacked by taking forthwith . . . such action as it deems necessary, including the use of armed force. . . ." (Emphasis added.)

The difference in language is not accidental and underscores Dulles' characterization of the SEATO treaty obligation as involving nothing more than consultation—and action within the channels established by the United Nations. Hypothesizing a refusal to act by the Security Council in the present circumstances would provide no greater justification for resort to use of force than would the refusal of Congress to declare war justify the President in taking the matter into his own hands.<sup>113</sup>

But the most shocking aspects of the Vietnam war, its ultimate illegality, transcends the narrow confines of treaties providing for the use of force, for it is a war of genocide within the meaning of the United Nations General Assembly Resolution 260 (III), which extends the concept of genocide to destruction of part of an ethnic group. Lemkin, "Genocide as a Crime under International Law," 41

<sup>113</sup> But Secretary Rusk once testified, "No would-be aggressor should suppose that the absence of a defense treaty, congressional declaration, or U.S. military presence grants immunity to aggression." *Ibid.*, p. 47.

American Journal of International Law 145 (1947). Early in 1966, perhaps before it was too late, George F. Kennan testified before the Senate Foreign Relations Committee,

"Our motives are widely misinterpreted, and the spectacle—the spectacle emphasized and reproduced in thousands of press photographs and stories that appear in the press of the world, the spectacle of Americans inflicting grievous injury on the lives of a poor and helpless people, and particularly a people of different race and color. . . ." <sup>114</sup>

Since Mr. Kennan's testimony, phrases like "Operation Phoenix," "scorched earth," and "Song My" have become a familiar, shameful part of our vocabulary.

Following are selections from the book *In the Name of America, Clergy and Laymen Concerned About Vietnam*, 1968, which compiles newspaper reports in an effort to establish countless violations of the rules of warfare:

On "Defoliation and Crop Destruction," pp. 283-304. From the New York Post, November 13, 1967, Thomas O'Toole, Washington:

"Two of the nation's foremost biologists have charged that the United States is waging chemical warfare in Vietnam that is not only a tactical failure but may also be poisoning Vietnamese plant and animal life for years to come.

"Spraying chemicals on rice crops believed to be in Vietcong hands, charge the two men in the current issue of 'Scientist and Citizen,' has not caused suffering and starvation in Vietcong ranks. What it has done, the two men insist, is to trigger a shortage of food for innocent women, children, infirm and aged Vietnamese.

"At the same time, writes Dr. Arthur Galston, president of the Botanical Society of America and Dr. Jean

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<sup>114</sup> Quoted in Fulbright, *supra*, p. 112.

Mayer, professor of nutrition at Harvard University, the spraying of herbicides to defoliate the countryside has apparently failed to expose the Vietcong trails and hideaways. Instead, claim the two men, the spraying has resulted in widespread damage to fruit and rubber trees, spinach and bean crops.

"The herbicides have also leaked into Vietnamese streams and rivers, Dr. Galston said, and 'while they may not be directly toxic to fish they may prove toxic' by killing the microscopic animals fish feed on.

"... Of particular concern to biologists, writes Dr. Galston, is the apparent escalation of the defoliation and crop spraying program. This year, Dr. Galston said, 'Plans were to spray 1,500,000 acres, with as much as 500,000 acres being crop land'—about 5% of South Vietnam's 8 million acres under cultivation.

"So huge is the spraying operation in Vietnam now, Dr. Galston said, that military demand for the herbicides used is four times what can be produced by U.S. chemical companies one of the largest being Dow Chemical Co."

On "Forced Transfer" of entire villages, pp. 305-341. From the New York Times, January 11, 1967, BENSUC, South Vietnam, January 8:

"For years this quiet, ill-kept village hugging an elbow of the Saigon River 30 miles northwest of the capital has been a haven for the Vietcong.

"One pacification program after another has failed here and, since a Government military post was abandoned more than a year ago, Bensuc has been considered a 'hostile' village. It has been an embarrassing problem for Saigon.

"This morning, 600 allied soldiers—mostly Americans—descended on the village and began 'solving' the problem.

"Within two weeks, the more than 3,800 residents of Bensue will be living in a new refugee settlement 20 miles to the southeast . . .

"... Then came a second message telling men, women and children: 'Go immediately to the schoolhouse. Anyone who does not go to the schoolhouse will be considered a V.C. and treated accordingly.'"

On "Refugees," pp. 343-367. From New York Times, Sept. 5, 1966, Charles Mohr, Saigon, South Vietnam, Sept. 4:

"... Perhaps the worst case of all is that of payment to more than a million war refugees. When the program began, a refugee got 7 cents a day subsistence for 30 days and then about \$35 to "resettle."

"After more than a year, the only improvement is that the refugee gets 10 cents instead of 7 cents for the first 30 days.

"One informed source said: 'Everybody knows that refugee payments are too low, but nothing is done about it because the Vietnamese Government doesn't want to raise them and we don't want to make an issue out of it. We turn our head.'"

From the New York Times, October 28, 1967, Tom Buckley, Saigon, October 27:

"... The removal of familiar village rituals, the lack of meaningful work and the absence, in many cases, of their fathers are believed to be having a harmful effect on the children, who make up perhaps two-thirds of the nearly 800,000 persons who are officially stated to be in camps and other temporary habitations . . .



"... as the children approach their teens the 'excitements' become a growing fascination with racketeering, petty theft and in the case of girls, prostitution . . .

"Land in secure areas suitable for growing rice, the staple of the Vietnamese diet, is at a premium. None is available for generally penniless refugees."

On "Civilian War Victims," pp. 369-384. From New York Times, May 8, 1967, Neil Sheehan, Washington, May 7:

"Senator Edward M. Kennedy asserted today that war casualties among South Vietnamese civilians were occurring at a rate of more than 100,000 a year . . .

"Maj. Gen. James W. Humphreys, director of the aid mission's Office of Public Health in Saigon, has estimated that 50% of the civilian casualties are caused by allied military action and 50 per cent by the enemy. Other experienced officials suggest that a majority are victims of allied military activity."

Chandler Brossard in the April 18, 1967, issue of Look Magazine, reports that 1,000,000 children have been wounded in the war, and that more than 250,000 have been killed.

On "Prisoners of War and the Wounded in the Field," pp. 55-90. From New York Times, September 30, 1965, Neil Sheehan, Saigon:

"... Vietnamese Army police and paramilitary organizations such as the national guard and the militia shoot Vietcong captives out of hand, beat or brutally torture them or otherwise mistreat them . . .

"The favorite methods of torture used by the Government troops are to slowly beat a captive, drag him behind a moving vehicle, apply electrodes to sensi-

tive parts of his body or block his mouth while water spiced with hot pepper is poured down his nostrils."

From New York Herald Tribune, Beverly Deepe, Saigon, April 25, 1965:

"In one known case, two Viet Cong prisoners were interrogated on an airplane flying toward Saigon. The first refused to answer questions and was thrown out of the airplane at 3,000 feet. The second immediately answered all the questions. But he, too, was thrown out. . . . One of the most infamous methods of torture used by the government forces is partial electrocution—or 'frying' as one U.S. advisor called it.

"This correspondent was present on one occasion when the torture was employed. Two wires were attached to the thumbs of a Vietcong prisoner. At the other end of the strings was a field generator, cranked by a Vietnamese private. The mechanism produces an electrical current that burned and shocked the prisoner.

"Vietnamese officers report that sometimes the wires are attached to the male genital organs, or to the breasts of a Vietcong woman prisoner.

"The water torture, also used by government forces, is painful but seldom fatal. One person forces the prisoner to gulp water, while another applies pressure on his stomach. This forces the water out and creates a feeling similar to drowning.

"Other techniques, usually designed to force on-looking prisoners to talk, involve cutting off the fingers, ears, fingernails or sexual organs of another prisoner. Sometimes a string of ears decorate the wall of a government military installation. One American installation has a Viet Cong ear preserved in alcohol."

On "Civilians, Suspects and Combatants," pp. 91-116.  
From New York Times, May 7, 1966, Saigon:

"Some of the 31 prisoners captured said they had been instructed to pretend they were Vietnamese farmers, the spokesman said.

"That's why we took so many Vietcong suspects—389 of them," said an officer. "We went around to all the fields and picked up the people working the edges of the fields. Probably a high percentage of the people we picked up will turn out to be Vietcong who were playing farmer."

From New York Times, March 3, 1967, Saigon:

"... In an operation that the First Cavalry Division (Airmobile) has been conducting in Binh Dinh Province, an enemy platoon was ambushed, with 10 killed. A total of 392 guerrillas have been reported killed and 2,699 suspects held for investigation since the operation began, on Feb. 12."

On "Use of Gas," pp. 117-230. From New York Times, January 4, 1966, Saigon:

"The spokesman emphasized that this was not the first time that gas had been employed in such a manner. In fact, United States troops have used it a number of times in various ways since Gen. William C. Westmoreland, the United States Commander in Vietnam, authorized its use in October."

On "Destroying Huts and Villages," pp. 131-152. From New York Times, September 16, 1965, Charles Moltr, Camne, South Vietnam, September 15:

"... In early August, a Marine battalion burned perhaps 500 houses in the embarrassing presence of a television camera crew.

"... Around them is some evidence that the war is hard for the Vietcong too. Although Defense Department spokesmen had criticized the Columbia Broadcasting System for saying that 150 were burned in Camne, marines and Vietnamese officials insist that the correct figure was 500."

On "Scorched Earth," pp. 143-152. From New York Herald Tribune, May 23, 1965, Saigon:

"... Near the big coastal city of Hue, U.S. Marines moved out on Friday from their defensive positions around Phu Bai air base and swept through Viet Cong dominated villages eight miles to the west. The Marines set crops on fire and burned or dynamited huts in a scorched-earth operation."

On "Aerial Bombardment in South Vietnam," pp. 173-268. From New York Times, section 4, November 7, 1965:

"... The air operation in South Vietnam alone is enormous. During October, pilots of the U.S. Air Force flew nearly 10,000 sorties. Giant B-52's, flying from Guam, bombed areas which Government troops never have been able to penetrate. In addition, other planes struck daily at military and supply targets in North Vietnam.

"The main problem with the bombing is that it inevitably results in civilian casualties in villages where the guerrillas hide. Sometimes the casualties are accidental; in one of the worst accidents, 48 South Vietnamese civilians were killed last week in the bombing of a village mistakenly believed to be controlled by the Vietcong."

On "Weapons," pp. 269-282. From New York Times, February 21, 1967, William Beecher, Washington:

"... In a typical bombing mission against North Vietnam, some planes will carry Shrikes to try to silence the radar surface-to-air missiles and antiaircraft guns and some planes will carry antipersonnel cluster bombs and other weapons designed to kill those who man the air defense weapons."

The above examples are typical. They are not selected for their sensationalistic character, and the list could go on indefinitely.\*

Two questions arise as to the relevance of this information: first, is it accurate—that, again, is a matter to be determined at a trial designed to answer the question, if that is thought necessary; second, is it a conscious decision on the part of those persons responsible for planning the conduct of the war—the answer to that question can be inferred from the scale of devastation, the level of physical punishment being inflicted on Vietnam. It seems inconceivable that the physical destruction of that country, the disruption of its society, the uprooting of its peoples, the sheer killing and suffering imposed on the civilian population—particularly women and children, the breaking down of traditional values, it seems inconceivable that all of this can be justified on any ground. The richest, most powerful and technologically advanced nation in the history of the world is tearing apart a small, helpless, backward, agricultural country whose wretched peoples have been subjected to war by Westerners for a generation.

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\*See e.g. Duffet (Ed.) *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal* (1968); Luce & Sommer, *Viet Nam, The Unheard Voices* (Cornell, 1969) pp. 174-176, 266-268; Jonathan Schell, *The Village of Ben Sue* (Vintage 1967).



Then too, there is the cost to our nation, in dead, in wounded, in families and lives disrupted, sometimes irreparably, in the searing, psychic injury of a young boy, not of legal age, who is exposed to the brutalization of this vicious, immoral war, who perhaps is himself forced to become a killer—and that, not in the cause of liberty or some other high-minded cause he believes in, for no one asks him whether he likes it or not, but solely because the President, by fiat, decides that it is his pleasure (or displeasure, it amounts to the same) that the boy comply. There is the cost in money badly needed for our poor, for our cities, and the urgent need for anti-pollution programs to restore ecological balance. And there is the damage to the conscience of our nation, a nation born in revolution from tyranny, dedicated to individual freedom and happiness, which suddenly finds itself cast in the role of oppressor, of bully, without quite understanding how it all happened.

Of course, the acts described above violate the rules of warfare. *Charter of the International Military Tribunal at Nuremberg*, 59 Stat. 1544 (1945), affirmed by unanimous resolution of the General Assembly of the United Nations, G.A. Res. 95(I), Dec. 11, 1946. Office of U.S. Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, Opinion and Judgment (1947); U.S. Dept. of the Army, *Trials of War Criminals Before the Nuremberg Military Tribunals under the Control Council Law No. 10* (1951); *Judgment of the International Military Tribunal for the Far East* (mimeographed), Nov. 1948; *Ex parte Quirin*, 317 U.S. 1, 27; *United States v. Pink*, 315 U.S. 203; *Cook v. United States*, 288 U.S. 102; cf. *In re Yamashita*, 327 U.S. 1. See also U.S. Dept. of the Army, *The Law of Land Warfare* (Field Manual No. 27-10, 1963).

• If there is to be any hope of preserving law and order—without which only anarchy is possible, this Court must respond to the felt need and declare that this war, however well-intentioned its planners may have been, is an ill-conceived and unlawful war. We must return to the original concept that both houses of Congress must affirmatively authorize the transition from peace into war, and that the President is not empowered to act without such authorization—except to repel attacks against the mainland, for it remains as true today as it was 180 years ago that it should always be easier for this country to go to peace than to go to war.

### III. IF THE LEGALITY OF THE VIETNAM WAR IS HELD TO BE A POLITICAL QUESTION, THE INDICTMENT AGAINST THE APPELLEE MUST BE DISMISSED.

Axiomatically, the Constitution delegates no power of any sort to wage an illegal war. This is equally true whether the illegality stems from the President's usurpation of the war powers by dispensing with the constitutional requirement that Congress "declare" war, or whether the illegality stems from the violation of binding treaties or of international laws of the rules of warfare.

For its part, the government must prove beyond a reasonable doubt every element of the offense, including proof that the induction order issued to the appellee was valid. And on his part, the appellee is entitled to his defense that the order was not valid, because the Vietnam war is illegal and therefore the Act lacks a constitutional foundation.

Consequently, if the legality of the Vietnam war is held to be a political question, appellee is deprived of his defense, and the indictment against him must be dismissed either on due process grounds or on the ground that the

court lacks jurisdiction of the offense. As Mr. Justice Murphy expressed the point in his concurring opinion in *Estep v. United States*, 327 U.S. 114, 131:

"There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal."

Mr. Justice Jackson, joined by Mr. Justice Frankfurter, further expounded the doctrine in his dissenting opinion in *United States v. Spector*, 343 U.S. 169, 177-178:

"The Act does not permit the court which tries him for this crime to pass on . . . the correctness or validity of the order. . . . If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective safeguards of all men's freedom."

Professor Henry M. Hart, Jr., commenting on the *Estep* decision, *supra*, reached the same conclusion, but articulated it in jurisdictional terms rather than in terms of due process:

"Three Justices of the Supreme Court of the United States were willing to assume that Congress has power under Article I of the Constitution to direct courts created under Article III to employ the judicial power conferred by Article III to convict a man of a crime and send him to jail without his ever having had a

chance to make his defenses. No decision in 164 years of constitutional history, so far as I know, had ever before sanctioned such a thing. Certainly no such decision was cited."

Hart, *the Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectics*, 66 Harv. L. Rev. 1362, 1382 (1953).

It follows that, if the issue of legality of the Vietnam war—as it bears on the power of Congress to conscript the appellee—is held to be a political question, the indictment against the appellee must be dismissed. Whether the dismissal is viewed as a matter of the jurisdiction of Article III courts or as a matter of due process under the Fifth Amendment depends on whether the political question doctrine is jurisdictional or discretionary, a question of academic interest, but one which would not affect the result herein.

The only basis for avoiding the necessity of dismissing the indictment would be to hold that, while the appellee has been deprived of the defense based on the illegality of the war, he will not have been harmed if he is acquitted on the ground that he "reasonably believed" the war to be illegal, a belief which negates the existence of specific intent. Such a constitutionally required defense, or rather such a constitutionally imposed "specific intent" element as part of the offense charged under the Act, would in fact result in the acquittal of the appellee: the district court found that the appellee was sincere and that his belief that the war is illegal, without necessarily being right, was reasonable (A. 252). Cf. Packer, *Mens Rea and the Supreme Court*; Article 6(a) and Article 8 of the Treaty of London, August 8, 1945, 59 Stat. 1544, which impose "individual responsibility" for determining the legality of a war.

IV. THE DISTRICT COURT CORRECTLY HELD THAT, AS APPLIED TO THE APPELLEE, THE ACT VIOLATES THE RELIGION CLAUSES OF THE FIRST AMENDMENT AND THE DUE PROCESS CLAUSES OF THE FIFTH AMENDMENT.

*Introduction.*

Appellee's prior argument herein has been that Congress has no power to draft him now, not because he is a conscientious objector, but because Congress has no power to draft now. By way of preface to the remaining argument based on the First and Fifth Amendments, the following points need to be emphasized so that they will not be obscured.

First, the government squarely bases the validity of the induction order issued to the appellee on "... the constitutional grant of power to Congress to raise and maintain armies (Art. I, Sec. 8). . . ." (Brief, p. 40).

Second, the government asserts that the power is absolute, and hence not subject to qualification by weighing it in a balance with individual rights. The only qualification conceded by the government as to the absolute character of the power is that if Congress chooses to exercise only a part of the power, as by legislative grace exempting religious pacifists, invidious distinctions may not be created. Thus, in the government's view, no problem of constitutional dimensions would be presented if Congress simply eliminated the exemption for religious pacifists.

By contrast appellee maintains that the Constitution delegates to Congress a limited, not an absolute, power of conscription—and then only by inference that the power is sometimes "necessary and proper" in responding to national emergencies. However, the other side of the coin, so to speak, is that conscientious objectors are constitutionally exempted from military service at the present time



under the First, or the Ninth, Amendment. The government denies the existence of this constitutional right of conscience by noting that language expressly protecting conscience was initially proposed and subsequently deleted from the bill of right (Brief, p. 46, n. 14). By the same logic, the government presumably would conclude that the doctrine of separation of powers was likewise rejected by the framers of the Constitution since the doctrine was considered but never formally adopted.<sup>1</sup>

But even a casual examination of the history of the drafting of the First Amendment reveals that in all probability the phrase "rights of conscience" was deleted as superfluous. The phrase was adopted by the House of Representatives on August 20, 1789:

"Art. III. Congress shall make no law establishing religion or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed."<sup>2</sup>

On June 8, 1789, Madison had proposed the amendment in this form:

"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."<sup>3</sup>

Commenting on the entire bill of rights as he had proposed it, Madison stated:

"Although I know whenever *the great rights*, the trial by jury, freedom of the press, or *liberty of conscience*,

<sup>1</sup> Farrand, *The Records of the Federal Convention of 1787* (1911), pp. 56, 66, 77, 138, 152, 163, 177, 537.

<sup>2</sup> Patterson, *The Forgotten Ninth Amendment* (1955), p. 86.

<sup>3</sup> *Id.*, p. 110.

come in question in that body, the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and *rights of conscience*, those choicest privileges of the people, are unguarded in the British constitution."<sup>4</sup> (Emphasis added.)

It is noteworthy that Madison singles out liberty of conscience as one of the "great rights."

On August 15, 1789, the clause had been amended to read as follows:

"No religion shall be established by law nor shall the equal rights of conscience be infringed."<sup>5</sup>

Commenting on this clause, Madison said he understood it to mean that:

"Congress should not establish a religion, and enforce a legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."<sup>6</sup>

However, the clearest expression that the word "religion" as used in the Constitution encompasses freedom of conscience appears from the "declarations of rights" which preface the ratification of the Constitution by the states of New York, North Carolina, Rhode Island and Virginia. Thus, on July 26, 1788, New York ratified the Constitution.

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<sup>4</sup> *Id.*, pp. 112-113.

<sup>5</sup> *Id.*, p. 160.

<sup>6</sup> *Id.*, p. 161.

"Under these impressions and declaring that the rights aforesaid cannot be abridged or violated and that the Explanations aforesaid are consistent with the said Constitution."<sup>7</sup>

Among the rights declared to be inviolable as well as consistent with the Constitution was the following:

"That the People have an equal, natural and unalienable right, freely and peaceably to *Exercise their Religion according to the dictates of conscience*, and that no Religious Sect or Society ought to be favoured or established by Law in preference of others."<sup>8</sup> (Emphasis added.)

Rhode Island likewise declared the existence of certain inalienable rights, "of which men when they form a social compact, cannot deprive or divest their posterity,"<sup>9</sup> and declared that the Constitution was being ratified by Rhode Island with the understanding that nothing in the Constitution could be interpreted as an attempt by Rhode Island, by social compact, "to divest posterity of these inalienable rights."<sup>10</sup> Among the inviolable rights declared by Rhode Island is:

4th. That *religion*, or the duty which we owe to our Creator, and the manner of discharging it, *can be directed only by reason and conviction*, and not by force or violence, and therefore all men, have an equal,

<sup>7</sup> Hunt & Scott, *The Debates and the Federal Convention of 1787 Which Framed the Constitution of the United States of America*, reported by James Madison (New York, 1920).

<sup>8</sup> *Id.*, p. 666.

<sup>9</sup> *Id.*, p. 681.

<sup>10</sup> *Id.*, p. 683.

*natural and inalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored, or established by law in preference to others."*<sup>11</sup> (Emphasis added.)

North Carolina and Virginia declared the existence of the same inalienable right consistent with the Constitution in language virtually identical to that employed by Rhode Island.<sup>12</sup> All define free exercise of religion as meaning "free exercise of religion according to the dictates of conscience," and all declare that "religion . . . can be directed only by reason and conviction."

Clearly, the "rights of conscience" declared and recognized repeatedly when the Constitution was ratified and the Bill of Rights adopted, permit no doubt that such rights either are included in the religion clauses of the First Amendment, or—since they are inalienable—are recognized by the Ninth Amendment declaration that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Of course, appellee does not assert a general right of unlimited scope to follow the dictates of his conscience, see, e.g., *McGowan v. Maryland*, 366 U.S. 420, 437, 440, but rather he asserts a limited right of conscience in the context of objection to war. Chief Justice Stone was clearly correct in admonishing: ". . . both morals and sound policy require that the state not violate the conscience of the individual. All our history gives confirmation to [this] view . . ." and

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<sup>11</sup> *Id.*, p. 681.

<sup>12</sup> *Id.*, pp. 676, 662, respectively.

"... there ... is a very radical distinction between compelling a citizen to refrain from acts which he regards as moral but which ... the law regard[s] immoral ... and compelling him to do affirmative acts which he regards as unconscientious and immoral."

The Conscientious Objector, 21 Columbia University Quarterly, No. 4, October 1919, pp. 268-269. It follows that the right to be a conscientious objector is one of those rights recently described as "fundamental" with deep roots in the "traditions and [collective] conscience of our people," and protected by the Ninth Amendment. *Griswold v. Connecticut*, 381 U.S. 479, 493 (concurring opinion of Mr. Justice Goldberg joined by the former Chief Justice and by Mr. Justice Brennan).<sup>13</sup>

#### *The Non Establishment Clause.*

The court below developed at length the reasons why the statute as applied to appellee would violate the free exercise clause of the First Amendment even in the absence of exemption, presently included in the statute, in favor of those conscientiously opposed to war in any form.<sup>14</sup> Because of the degree of attention given this point in the opinion of the District Court, which appellee substantially adopts as his argument before this Court, it seems appropriate to devote this section of appellee's brief primarily

<sup>13</sup> This case, unlike *Griswold v. Connecticut*, *supra*, of course does not involve the problem of "incorporation" of the Ninth Amendment in the Fourteenth; only federal action is here questioned.

<sup>14</sup> After the government filed its brief herein, the District Court for the Northern District of California, on December 24, 1969, acquitted a religious selective objector in *United States v. Bowen*, Cr. No. 42,499. Hence the statement in the government's brief, p. 48, that no court other than the district court below has recognized selective objection, is no longer accurate.



to the question of unconstitutional discrimination. In view of the nature of appellee's belief and the denial to him of an exemption granted to others whose cases cannot be constitutionally distinguished, to punish appellee for refusal to submit to induction would constitute a preference of one sort of religious belief over another in violation of the First Amendment.

It is important to dispel certain misconceptions created by the government's brief as to the character of the issues to be decided and the situations that must be considered in order to reach a sound decision in the present case.

In the first place, it is not correct, as the government's brief implies, that appellee's case can be considered only in relation to the case of the formally religious objector to all wars who is clearly exempt under the statute. Specifically, the government's brief states that it is not necessary to consider in the present case what disposition is to be made of the case of the objector to all wars whose belief is not formally religious but has ethical roots akin to those of appellee (Brief, pp. 51-52). *Welsh v. United States*, No. 76, 1969 Term. Furthermore, the government does not take adequate account of the relation between the appellee's case and that of an objector who, like appellee, is not necessarily opposed to all wars, but whose opposition to the Vietnam war is grounded in religion in the formal sense. *United States v. Bowen*, Cr. No. 42499 (N.D. Calif. Dec. 24, 1969). In order to avoid an unconstitutional difference in treatment, it is necessary to reconcile the disposition of the present case with the disposition to be made of these other cases arising under the same statute and involving the same or very similar constitutional considerations.

The government appears to take the position that any claim of discrimination in the present case arises solely under the due process clause of the Fifth Amendment and

not under the religion clauses of the First Amendment. Specifically, it suggests that this is the only basis for appellee's complaint in regard to difference in treatment between those opposed to war in any form and those who are not necessarily opposed to every war (Brief, 11, 43, 47, n. 15, 51). The inadequacy of this approach, an approach that results in obscuring appellee's rights under the First Amendment, becomes clear from an examination of appellee's position in relation to other types of conscientious objectors.

Consider first the position of the clearly religious, although selective, objector. Under the statute he is not exempt. Only those opposed to all war are exempt. The government's argument is that the sole question presented for consideration in such a case is whether the distinction between general and selective is so arbitrary and irrational as to violate the due process clause and that there is no question of discriminatory treatment of different religious beliefs in violation of the First Amendment. This view might make sense if the statute exempted all general objectors, while not exempting any selective objectors. But that is not what the statute does. It does not exempt all general objectors. It exempts only those whose objection is based upon religious belief. The statute exempts those "who, by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form." 50 U.S.C. App. 456 (j). The general objector whose objection is based upon political, sociological or economic considerations, for example, is not exempt. It is clear that what Congress believes worthy of exemption is objection that is both general *and* religious, objection in which these two elements are so related that the generality of the objection derives from the religious character of the belief. It is this obvious fact about legislative intent and statutory structure that gives rise to a question of in-

validity under the establishment and free exercise clauses of the First Amendment.

To make this important point clear, the claim of the orthodox religious selective objector that he cannot be convicted under the statute as it is presently drawn arises under both the due process clause of the Fifth Amendment and the religion clauses of the First Amendment. Insofar as the distinction between general and selective can find no basis in reason, which we believe to be the case, it violates the due process clause. This same arbitrariness constitutes a violation of the establishment and free exercise clauses, because of the manner in which religion and opposition to war in any form are conjoined in the statute. The First Amendment claim in fact has a different, more urgent quality than that arising solely under the due process clause. A distinction made between religious beliefs, such as is made by the statute between the general religious objector and the selective religious objector, requires more cogent reasons for its justification than a distinction made on some ground other than religion. This is because, as this Court has said, one of the principal purposes of the First Amendment was to prevent discrimination among religious beliefs and to prevent the preference of one religion over another. *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 15 (1946).

Consider next the case of the person who objects to all war, but whose objection rests upon ethical beliefs similar to those of appellee, rather than upon formal religion. Unless one takes the position that promoting one religious belief over another, or promoting a formal religion over more personally conceived creeds is a policy devoid of rationality—a proposition that would brand as irrational the policy of many governments down through the centuries—this person's claim rests exclusively upon the religion clauses of the First Amendment and the constitutional pro-

hibition against preferring one religious belief over another. The case here supposed is the constitutional equivalent of *United States v. Seeger*, 380 U.S. 163.

Finally, what is the nature of the appellee's claim in the present case? He is a selective objector. Although he is conscientiously opposed to the Vietnam war, he is not prepared to say *a priori* that all uses of military force in all circumstances is morally wrong—a position one can hardly describe as unreasonable for a morally concerned man. Although the basis of appellee's objection is not formal religion, it is certainly conscientious, and the court below spoke of it as founded upon "the deepest convictions and ethical commitments, apart from formal religion, of which a man is capable" (A. 249). Appellee's claim to be treated on an equal footing with the selective objector whose position is based on religion in the formal sense, rests upon the religion clauses of the First Amendment and the policy against preferment of particular religious beliefs. Along with the formally religious selective objector, however, his claim to be treated on an equal footing with the general religious objector rests on both the due process clause of the Fifth Amendment and the religion clauses of the First. To deny the appellee exemption when it is granted to the general religious objector is both arbitrary and irrational and a preferment of one religious belief in the constitutional sense over another.

In support of its view that the statute does not impose an impermissible discrimination among religious beliefs in its failure to exempt objectors to particular wars, the government argues that such objection is political or sociological and cannot be religious. This notion is simply not supported by an examination of the beliefs and traditions of many sincerely religious individuals and groups.<sup>15</sup> That

<sup>15</sup> See the District Court's reference to the teachings of Thomas Aquinas and Pope John XXIII (A. 262).

objection is to particular wars rather than all wars does not necessarily mean that the objection is not rooted in values and beliefs as ultimate as any that support objection to war in all circumstances. As the court below pointed out, "[A] selective conscientious objector might reflect a more discriminating study of the problems, a more sensitive conscience, and a deeper spiritual understanding" (A. 258).

That some element of reasoning and reflection upon the data of experience and contemporary events enters into the formation of judgment that a particular war is wrong does not deprive that judgment of its moral and religious quality, of a foundation in ultimate values. The notion that a process of reasoning and self-education is inconsistent with religion was laid to rest in the *Seeger* case where the defendant reached his conscientious position by just such a process. There is neither more nor less reasoning necessarily involved in reaching the conclusion that all war violates ultimate values than there is in reaching the conclusion that a particular war does.

Likewise, an objection is not deprived of its religious foundation because it is of a relatively limited scope and reflects a discriminating moral judgment because it condemns a particular military action rather than engaging in wholesale condemnation. No one would maintain that a man's refusal to kill a particular person under certain circumstances was not religiously motivated because it was not accompanied by a declaration that it is wrong ever to kill anyone under any circumstances, nor that an objection to the use of the hydrogen bomb on the civilian populations of large cities is not religiously grounded because not accompanied by a declaration that it is also wrong to



use any weapons in any circumstances.<sup>16</sup> In fact, those who are exempt under the statute because they are religiously opposed to participation in "war in any form," are permitted to make moral distinctions without forfeiting their exemption. Thus they need not be opposed to the use of domestic police, nor to the use of force in self-defense.<sup>17</sup> If these distinctions do not destroy the religious quality of objection, it is hard to see why a distinction drawn among wars themselves should do so.

Are there any nonreligious purposes served by the distinction between general and selective objection which the government is entitled to pursue, even if doing so occasions incidental preference of particular religious beliefs? Such considerations must be especially cogent and impressive, and incapable of being satisfied in another manner, to justify the effect of promoting one religion over others. The truth of the matter is that neither the government in its brief nor the commentators who have addressed them-

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<sup>16</sup> "With these truths in mind, this most holy synod makes its own the condemnations of total war already pronounced by recent popes, and issues the following declaration: Any act of war aimed indiscriminately at the destruction of entire cities of extensive areas along with their population is a crime against God and man himself. It merits unequivocal and unhesitating condemnation." Pastoral Constitution on the Church in the Modern World, Second Vatican Council, Pt. II, chapter V, sect. 1.

<sup>17</sup> In *Sicurella v. United States*, 348 U.S. 385, the Court took it as conceded by the government that a person could be in favor of self-defense, defense of family, and associates and still be entitled to exemption. The question presented by the case was whether a readiness to fight in defense of brethren, Kingdom Interests and ministry, and to engage in wars commanded by Jehovah, deprived a person of exemption on the ground that he was not opposed to "participation in war in any form," and the Court held that it did not. The majority of the Court and Mr. Justice Minton, dissenting, disagree in their interpretation of the record as to whether the petitioner was willing to use "carnal weapons" for these purposes.

selves to this matter.<sup>18</sup> have come up with anything that even begins to justify a difference in treatment.

One consideration that has been suggested is that it is more difficult to determine the sincerity of selective objectors, but the court below would seem to have given an irrefutable answer to this suggestion (A. 259-260).

The government in its brief can only say that Congress denied exemption to selective objectors "for understandable reasons" (Brief, p. 46, n. 14), and that it is "self-evident" that there is a rational basis for the distinction (p. 47). However, when one seeks to learn why it is self-evident and what are the "understandable reasons," the government's brief gives little help. The judgment of a selective objector is said to be "political," "personal" and "immediate," these qualities supposedly distinguishing it from that of the general objector (p. 47). As has already been pointed out, it is not possible to maintain that opposition to a particular war is necessarily any more political or less religious than opposition to all wars. As the court below noted, if by saying that opposition to particular wars is political the government means simply that such opposition involves a judgment as to the conduct of the state, then "any decision as to any war is not without some political aspect" (A. 252). So far as the "personal" quality of a judgment is concerned, the *Seeger* case made it clear that a personal judgment can be as religious as an institutionally supported judgment or a judgment resting upon authority. Furthermore, what could be the relation between the "personal" nature of the judgment and a secular purpose that Congress is entitled to pursue? And as for the selective objection being "immediate," this does

<sup>18</sup> Potter, *Conscientious Objection to Particular Wars, Religion and the Public Order* 44 (1968) Finn, E. D., *A Conflict of Loyalties: The Case for Selective Conscientious Objection* (1968); Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. 347 (1969).

not seem to refer to the objection being formed hastily, but rather, once again, to the limited character of the objection in that it does not involve a blanket condemnation of all wars. In other words, it is simply to restate that the objection is selective, not to give any explanation of why this fact is significant in terms of a secular purpose that Congress is entitled to pursue notwithstanding the creation of a preference of religion.<sup>19</sup>

When one seeks an explanation for the *feeling* that selective objectors are different from traditional pacifists and ought to be treated differently, it seems to come down to this. The selective objector creates more discomfort and anger than the pacifist. The pacifist when asked why he is opposed to the Vietnam war says that he is opposed to all war, not especially to the Vietnam war, and that he would be opposed to a war no matter how justified it seemed to the man of average moral sensibilities, even a war of pure defense. The character of this response enables the hearer to escape feeling personally and directly challenged on moral grounds because the position taken by the pacifist is entirely beyond the range of moral standards to which he is accustomed and by which he attempts to judge himself. With the selective objector, however, the situation is quite otherwise. When asked why he is opposed to the Vietnam war, he does not produce a sweeping general objection wholly outside the range of familiar moral discourse. Instead he produces reasons specifically applicable to the situation at hand and engages in argument of a sort that the hearer recognizes as having something to do with himself as a moral man. The selective objector concedes

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<sup>19</sup> In n. 16 on p. 49 of its Brief, the government states the substance of the views of the majority of the Marshall Commission on the subject of selective objection. The cogent opinion of the minority of that Commission effectively demonstrates the murkiness and inadequacy of the majority's reasoning.

that there may be situations in which the use of military force is justified; he agrees in many things, but disagrees about the situation at hand. It is the difference between telling a businessman that all business is a fraud and telling him that a particular business practice in which he is engaged is dishonest. The specificity of the indictment explains the strength of the businessman's emotional response.

But an explanation of a feeling about selective objection hardly amounts to a reason upon which to found punitive governmental action or to justify a discrimination among religious beliefs. What remains is simply a preference of certain religious beliefs over others, a preference condemned in *Everson v. Board of Education*, 330 U.S. 1, 15 (1946). The influence of government, in the words of the Court's opinion in *Torcaso v. Watkins*, is being "put on the side of one particular sort of believers," 367 U.S. 488, 490, and against the free development of moral and religious ideas about the morality of war. The First Amendment was clearly designed to prohibit government from aligning itself in this fashion with any religious tradition. It is the diversity and free development of religious ideas, spoken of in *Seeger*, that is at stake.

In *Seeger* the question was whether the statute contained a preference for traditional theistic beliefs. Here the question is whether the statute contains a preference for religious beliefs that lead to a wholesale condemnation of war over religious beliefs that lead to more discriminating moral judgments.

The foregoing arguments concerning discrimination have been made on the assumption that the selective objector is clearly religious. Such a selective objector must be exempt if exemption is given general religious objectors, in order to avoid an impermissible preference of religion. Appellee's position is that the character of his objection entitles

him to exemption as well if the formally religious selective objector is exempt.

Whatever the possibly narrow meaning of "religious training and belief" may be under the 1967 version of section 6(j),<sup>20</sup> from the beginning appellee has contended that the character of his belief entitles him to protection under the First Amendment. The government's repeated characterization of appellee as nonreligious should not obscure what appears from the opinion of the court below. The court stated that the beliefs of persons like appellee, although they may not rest upon formal religion, do rest upon "the deepest convictions and ethical commitments, apart from formal religion, of which a man is capable" (A. 249). In another place, the court referred to "men, like Sisson, who whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings" (A. 263). The court also stated that "Sisson's table of ultimate values is moral and ethical. It reflects quite as real, pervasive, durable, and commendable a marshalling of priorities as a formal religion. . . . what another derives from the discipline of a church, Sisson derives from the discipline of conscience" (A. 252). These findings as to the nature of appellee's belief could as well characterize the beliefs of the defendant in the *Seeger* case and, as the opinion in the *Seeger* case suggested, commitments of this nature fall within the broadened notions of

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<sup>20</sup> The Director of the Selective Service System, Gen. Hershey, whose function it is to administer the process of selection of manpower for the armed forces, is persuaded that in amending section 6(j) in 1967, Congress intended to narrow the scope of the statutory concept of "religion" so as to revert to the pre-*Seeger* administrative definition. Legal Aspects of Selective Service, Gov. Print. Off. (January 1, 1969), pp. 13-14.



religion that characterize modern thought.<sup>21</sup> In *Torcaso v. Watkins*, the Court made it clear that the protection of the First Amendment is not restricted to traditional religions based upon a belief in the existence of God, but includes many other religions, such as Ethical Culture and Secular Humanism. 367 U.S. 488, 495, n. 11.

It is important to lay to rest the unwarranted fears that the government's brief stirs as to the implications of an affirmance in this case. The parade of horrors suggested is hardly justified. The government's brief states that an affirmance "would of necessity extend beyond the Selective Service context and reach all matters as to which an individual claimed to be conscientiously opposed . . .," and that this would be "wholly destructive of the orderly functioning of government and would undermine the essential integrity of the democratic process" (pp. 46-47). In another place the government mentions conscientious objection to open housing legislation and states that if selective objection to war is allowed, "there is no logical stopping place insofar as persons who oppose other governmental policies are concerned" (pp. 48-49).

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<sup>21</sup> In the course of construing the phrase "religious training and belief" in section 6(j), this Court in *Seeger* spoke of the "richness and variety of spiritual life in our country." 380 U.S. at 174. Among the types of believers mentioned are those who "think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace." *Ibid.* The Court also spoke of "the ever-broadening understanding of the modern religious community." *Id.* at 180, and "the diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated." *Id.* at 183. The Court by way of further illustration of the variety of religious beliefs, quoted from Dr. David Mussey, leader in Ethical Culture Movement, a passage very similar to the lower court's characterization of defendant's belief in the present case: "Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive." *Ibid.*

These fearful statements wholly ignore the magnitude of the interest that a man has in not killing in violation of his conscience and the interest of the community in respecting his conscientious predicament. Throughout its history the nation has recognized the special urgency of a claim to be relieved from killing in violation of conscience. The fact that our conscription legislation has always included provision for conscientious objectors, although exemption was not provided from other legal obligations, evidences a deep community awareness of a uniquely serious problem.

The court below reached the conclusion that "the magnitude of Sisson's interest in not killing in the Vietnam conflict as against the want of magnitude in the country's present need for him to be so employed" (A. 261) prohibited the application of the Act to him to require combat service in Vietnam. It is important to observe that this judgment as to the relative magnitude of an interest protected by the First Amendment and the country's need for appellee to perform combat service in Vietnam is not principally relevant to the claim of impermissible discrimination in violation of the First and Fifth Amendments. It is principally relevant to the court's alternative holding that appellee could not be convicted even if there were no conscientious objector exemption in the statute. So far as the discrimination claim is concerned, no matter how pressing the country's need for troops, it is not constitutionally proper to meet that need by a conscription act that discriminates between different types of belief according to whether they are of the traditional theistic variety or of the sort embraced by the defendant in the *Seeger* case and the appellee in the present case, or according to whether they involve objection to all wars or only to some wars.

### *The Free Exercise Clause.*

In regard to the District Court's alternative ground for decision, it is not correct to say, as the government does, that the court has overridden a legislative and executive determination of a need for combat troops in Vietnam. The government states that, "It is not the province of courts to decide . . . whether there is or is not any need for specified numbers of men in a particular place at a certain time," and that "the court below has substituted its opinion for that of the legislative and executive branches as to what constitutes national need" (pp. 40, 41). There is no dispute as to the limited nature of the government's need for combat troops in Vietnam. As the court below observed, there is no "suggestion that in present circumstances there is a national need for combat service from Sisson. . . ." (A. 258.) "'The last extremity' or anything close to that dire predicament" has not been "glimpsed, or even predicted, or reasonably feared" (A. 261). Action of the legislative and executive branches themselves, not any finding by the court below on the basis of conflicting evidence, establish the limited character of the need for troops in Vietnam. The variety of exemptions in the Act, including the exemption of certain types of conscientious objectors, supplemented by what is common knowledge, establishes the limited character of the need for combat troops. If further argument is needed, it is provided by the recent adoption of a lottery system to determine who shall serve in the Armed Forces when only a fraction of available manpower is needed.

The court below did not find the limited nature of the government's need for combat troops in Vietnam in the face of some dispute about that fact or in disregard of legislative or executive findings. Rather, on the basis of unquestioned facts, it assessed their constitutional significance, a function wholly appropriate to a court charged

with the duty to protect values embodied in the Bill of Rights. The court properly held that, given the limited need for combat troops in Vietnam, the constitutional protection guaranteed in the free exercise clause requires that the government accommodate its conscription methods to take account of the conscientious scruples of persons in appellee's position. Considering the magnitude of the appellee's interest and the interest of society in not compelling persons to choose between jail and their deepest beliefs in so grave a matter as the taking of human life, this hardly seems an exaggerated reading of the free exercise clause. This is especially true considering the demonstrated ability of the nation to carry on far greater conflicts, such as World War II, while at the same time granting numerous exemptions, some on grounds much less impressive than conscientious objection.<sup>22</sup>

To the extent that the magnitude of the governmental interest is considered and weighed against the appellee's interest and the nation's interest in regard to conscientious objection, it is difficult to see how the district court's conclusion can be avoided if the free exercise clause is to be given any meaning. Otherwise the assertion of any governmental interest would of itself make inapplicable the free exercise clause. To accept the government's argument on this point (p. 42) would place the religious liberty guarantee in the Bill of Rights entirely at the mercy of legislative action, no matter how extreme. But the Bill of Rights was intended to declare limits upon the scope of legislative power. On other occasions this Court has considered the magnitude of governmental interests and

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<sup>22</sup> That a threat to military effectiveness does not result from granting exemption to conscientious objectors, even in what must be characterized as "the last extremity" is demonstrated by the fact that England granted exemption to all conscientious objectors, including selective objectors, during World War II.

found them insufficient to justify a burden on the free exercise of religion. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963); cf. *In re Jenison*, 375 U.S. 14 (1963), on remand, 267 Minn. 136, 125 N.W. 2d 588 (1964).

It was precisely the fear of arguments for the expediency of unbridled legislative and executive power which prompted the adoption of the Bill of Rights: the first eight amendments in terms limit the power of the federal government, the ninth declares that the first eight amendments do not exhaust the list of inalienable individual rights, while the tenth reemphasizes the fundamental principle that ours is a government of limited powers, so that powers not delegated are retained by the states and the people. The First Amendment is directed squarely at "Congress."

The government's refusal to admit the necessity of accommodating Congress's claim of power to raise armies by conscription with the individual's claim to freedom of conscience is a refusal to acknowledge the importance of individual liberty in our system of democratic institutions. The price the government is willing to pay in the name of national defense is the elimination of the *right* to individual liberty, as opposed to a qualified "privilege" to liberty granted by legislative grace. Congress has no power under the Constitution to exact appellee's liberty in order to pay that price. For the Court of Appeals for the Second Circuit was surely correct when it observed,

"... the principal distinction between the free world and the Marxist nations is traceable to democracy's concern for the rights of the individual citizen, as opposed to the collective mass of society. And this dedication to the freedom of the individual, of which our Bill of Rights is the most eloquent expression, is in large measure the result of the nation's religious heritage."



*United States v. Seeger*, 326 F. 2d 846, 854-855, aff'd 380 U.S. 163. To permit the government to take appellee's liberty would be to eliminate the most fundamental difference between the concept of society embodied in the Constitution and the concept of totalitarian society.

### Conclusion.

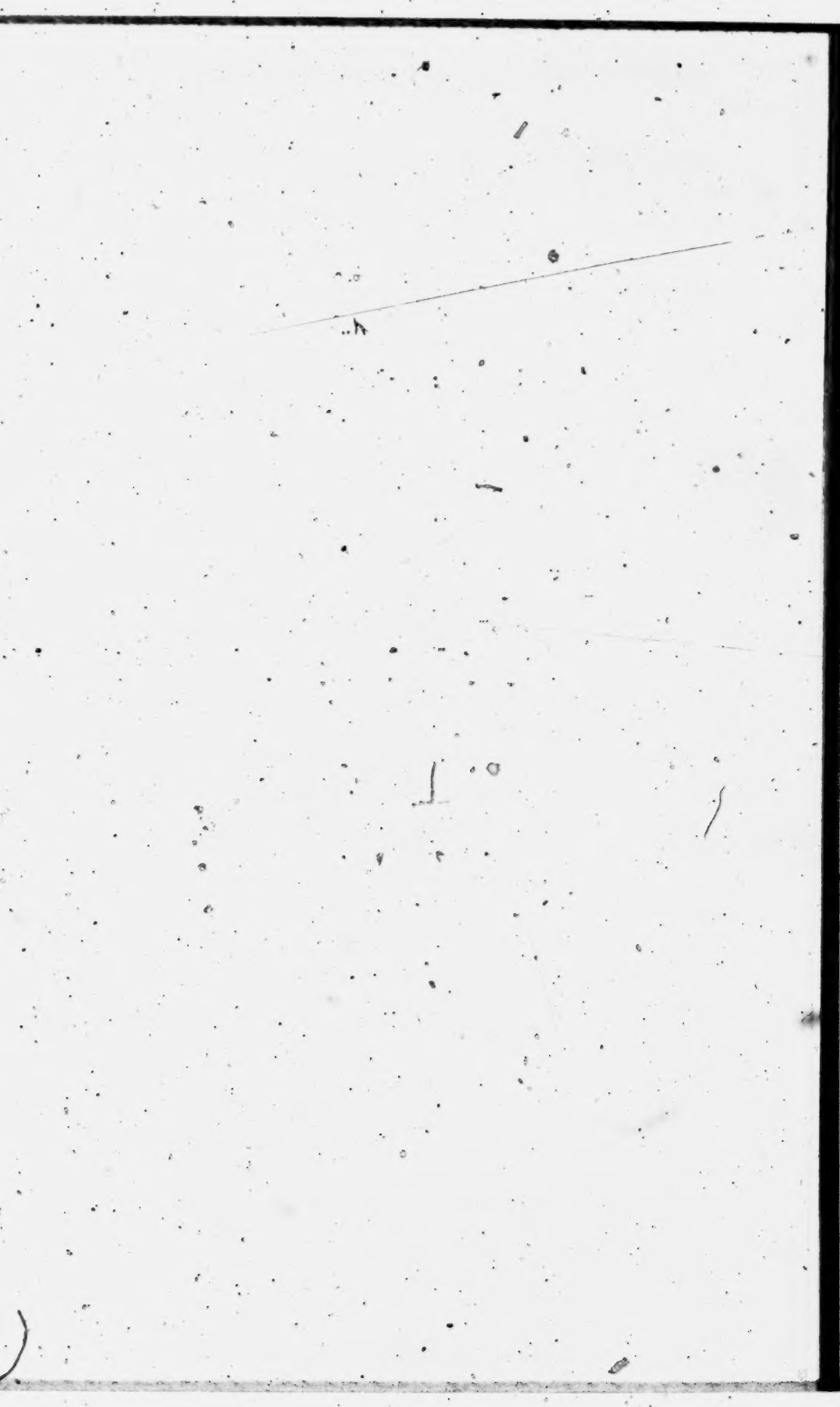
Ultimately, what is at stake in this case is the viability of our present institutions. In its zeal to defend the Nation, the government is systematically destroying the values and institutions which make the Nation worth preserving. And in accumulating its vast powers, the government is rendering itself obsolete, a dinosaur whose certain fate is extinction.

This Court should exert all of its authority to halt the escalation of governmental power and restore the traditional values which once characterized our society—life, liberty, the pursuit of happiness. It may be difficult to always achieve the proper balance between governmental power and individual rights, to strike the “golden mean,” but viewed in perspective, this case is not hard to decide. The appellee respectfully submits that the judgment of the district court should be affirmed.

JOHN G. S. FLYM.

On the brief,

FLYM, ZALKIND & SILVERGLATE.





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**Supreme Court of the United States**

**October Term, 1969**

**No. 305**

**UNITED STATES OF AMERICA,**

*Appellant,*

*v.*

**JOHN HEFFRON ~~SISSON~~, JR.**

**On Appeal from the United States District Court  
for the District of Massachusetts**

**BRIEF FOR THE AMERICAN ETHICAL UNION  
AS AMICUS CURIAE**

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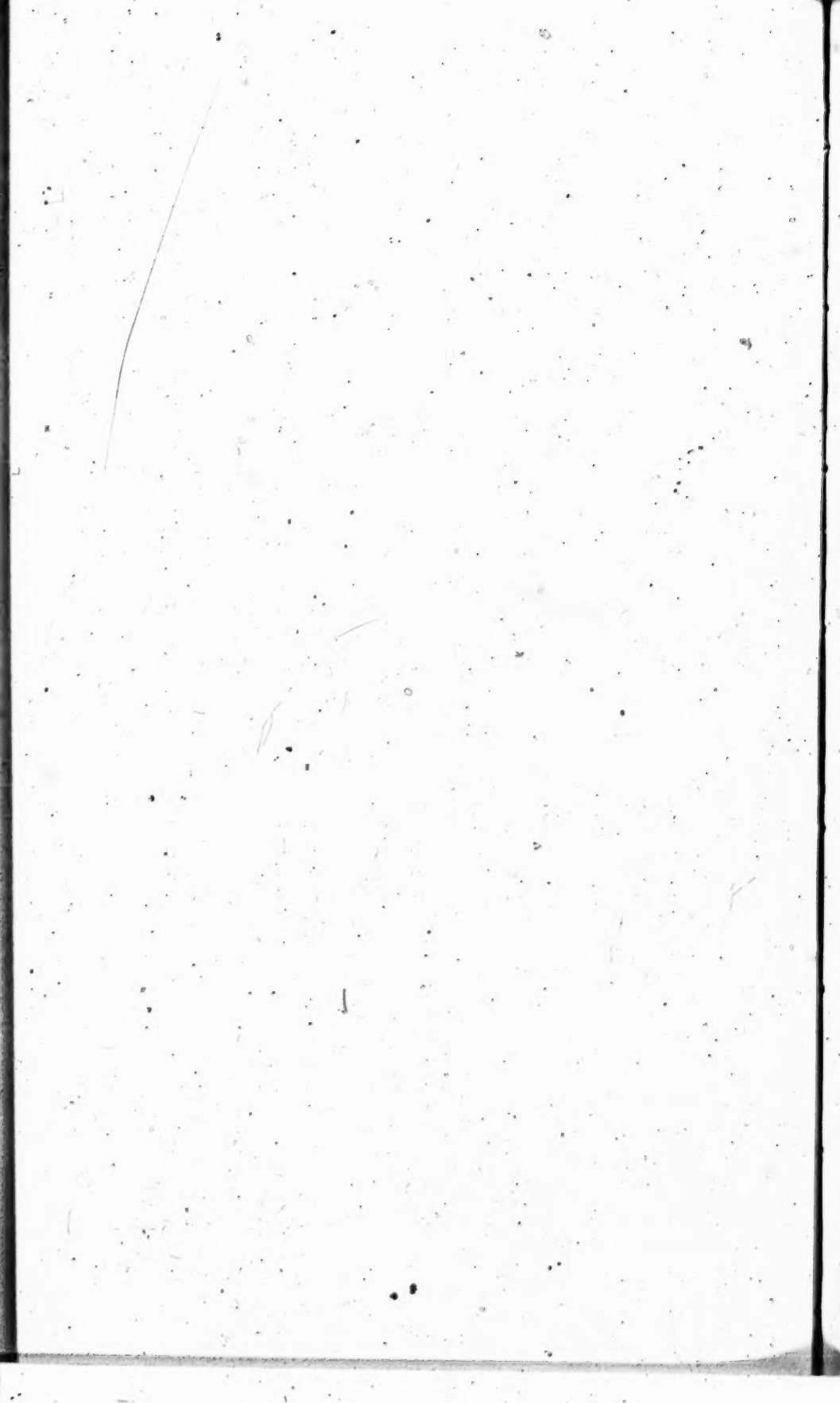
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# Supreme Court of the United States

October Term, 1969

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Nó. 305

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UNITED STATES OF AMERICA,

*Appellant,*

*v.*

JOHN HEFFRON SISSON, JR.

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On Appeal from the United States District Court  
for the District of Massachusetts

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## BRIEF FOR THE AMERICAN ETHICAL UNION AS *AMICUS CURIAE*

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### The Interest of the American Ethical Union

This brief is submitted on behalf of the American Ethical Union with the consent, filed with this Court, of both parties.

The American Ethical Union is a federation of all the Ethical Culture Societies and Fellowships in the United States, which, collectively, constitute a liberal religious fellowship known as the "Ethical Movement" or the



"Ethical Culture Movement." The first Ethical Culture Society was founded in New York City in 1876 by Dr. Felix Adler. Through its membership in the International Humanist and Ethical Union, the American Ethical Union is part of a world-wide association of humanist groups and Ethical Culture Societies.

Ethical Culture has been recognized as one of those "religions in this country which do not teach what would generally be considered a belief in the existence of God." *Torcaso v. Watkins*, 367 U. S. 488, 495, n. 11 (1961). Ethical Culture has no fixed creed or dogma, and requires no particular theological beliefs of its members.

Whether one does or does not believe in God, prayer or immortality, is one's own affair. Membership in an Ethical Society is not conditioned on acceptance or rejection of any one answer to such questions.

In the Ethical Movement the good life and the rights and duties of human beings are looked upon as stemming from man's relations to man in the family of mankind. [*Do You Know the Ethical Movement?*, pamphlet published by the American Ethical Union, 2 West 64th Street, New York 23, N.Y. p. 3]

The issues in this case and in the companion case of *Welsh v. United States*, No. 76, October Term 1969, are matters of serious concern to the American Ethical Union. Ethical Culture is founded on what is thought to be the ethical component of man—i.e., his conscience. Today the conscience of many (particularly young people) is deeply affected by the radical changes in warfare of the atomic age. The generation now subject to the draft has lived its entire life in a world which may be annihilated at any

moment. Many who volunteered in World Wars I and II might not be able conscientiously to participate at all in war where atomic weapons would be used. Others add to their moral condemnation of the present war the fear that atomic weapons might increase its random destruction.

Some members of Ethical Culture Societies are today serving in the Armed Forces; others are affiliated with the Fellowship of Ethical Pacifists, which opposes participation in all wars, and some would object to participation in the present war but not necessarily to participation in all wars. This is consistent with a fundamental tenet of Ethical Culture that each individual is ultimately responsible for his own actions and is required to make his own moral and ethical decisions. We submit that the situation of a member of an Ethical Culture Society conscientiously unable to participate in the Vietnam war is not dissimilar to the position recently recognized by the District Court for the Northern District of California in *United States v. Bowen* (Cr. No. 42499, decided December 24, 1969), a case involving a practicing Catholic. The Court stated in holding Bowen constitutionally entitled to exemption:

According to the Catholic doctrine, as Bowen understands it, there are just and unjust wars. This Catholic doctrine, to which Bowen sincerely deems himself bound by his religion, sets out certain standards according to which each Catholic is to determine for himself whether a war is just. If he determines it is unjust, a Catholic must not participate in it. To do so would be to violate his religion. After instruction and study in this doctrine, Bowen concluded that it would violate his religion and his conscience to participate in the Vietnam war. (Opinion, at 2-3).

Moreover, the conscientious objection to participation in war of objectors who do not claim "religion" as the source of their objection may be founded on precisely the same considerations as those which lead some members of Ethical Societies to decide they cannot conscientiously participate. We know of no way in which a rational distinction can be made between the man who reaches his decision alone, on the basis of his solitary reading and contemplation, and the man who reaches his decision after participation in the affairs of an Ethical Society. Yet, on the reading of the statute proposed by the Government, one could be recognized as a conscientious objector influenced by "religious training and belief," and the other could be rejected as an objector expressing a "merely personal moral code."

## ARGUMENT

### POINT I

**The First, Fifth and Ninth Amendments require that Section 6(j) of The Military Selective Service Act of 1967 be construed and applied to include Sisson's conscientious objection.**

Sisson's conscientious objections constitute a sincere and meaningful belief which occupies a place in his life parallel to that filled by the orthodox belief in God in one who clearly qualifies for the exemption.

In *United States v. Seeger*, 380 U. S. 163 (1965) this Court decided, in order to avoid serious constitutional dif-

faults with the predecessor of the present statute, to include the views of Daniel Seeger within the definition of "religious training and belief." Seeger postulated "an ethical belief in intellectual and moral integrity 'without belief in God, except in the remotest sense,' " 380 U. S. at 166. He concluded that "war, from the practical standpoint is futile and self-defeating, and that from the more important moral standpoint, it is unethical." *United States v. Seeger*, 326 F. 2d 846, 848 (2d Cir. 1964).

Here, John Heffron Sisson's "table of ultimate values" was characterized by the District Court as "moral and ethical," though not, by his own classification, "religious." *United States v. Sisson*, 297 F. Supp. 902, 905 (D. Mass. 1969).

To Sisson, the definition of immorality was that which is "contrary to my moral values and my ethics." A. 151. He testified:

My moral values come from \* \* \* religious writings, philosophical beliefs. [A. 152]

Sisson characterized the war in Vietnam (hence the reason why he refused induction) as being:

[W]rong on every ground by which I could judge it, and to be immoral and to be illegal and to be unjust and unjustifiable in any way and because it went against my principles and my best sense of what was right. Therefore, I felt that by accepting induction that even though I might not be sent to Vietnam I would be consenting to the government's waging of war in Vietnam and I believed it my duty not to consent to this action because I did not consent in my own mind. [A. 151]

His affidavit in support of his motion to dismiss the indictment states:

On the basis of my knowledge of that war, I could not participate in it without doing violence to the dictates of my conscience. [A. 43]

The District Court concluded that Sisson "was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion." 297 F. Supp. at 905. Sisson's sincerity is conceded (Brief for the United States at 9, 41), just as was the case with Seeger. The District Court held that men such as Sisson could not be discriminated against because they do not label their belief "religious" where their objection to military service is motivated

by profound moral beliefs which constitute the central convictions of their beings. 297 F. Supp. at 911.

We submit that the statute should be construed in accordance with Judge Wyzanski's observation, *Id.* at 909, that

Duty once commonly appeared as the 'stern daughter of the voice of God.' Today, to many, she appears as the stern daughter of the voice of conscience. It is not the ancestry but the authenticity of the sense of duty which creates constitutional legitimacy.

We urge this Court to accept that reasoning and, in line with its determination in *Seeger*, to construe the statute to require exemption of conscientious objectors who respond to "the stern voice of conscience" irrespective of its derivative source, recognizing, as did the Court below, that "[w]hat another derives from the discipline of a church,



Sisson derived from the discipline of conscience." *Id.* at 905. We think that construction is consistent with *Seeger*, and indeed could be said to be required by *Seeger*.

We believe the requirement that conscientious objection be based on "religious training and belief" cannot be applied to exclude a sincere conscientious objector without violating the required neutrality of the Government in matters of individual faith and belief, and thus raising insurmountable problems of establishment of religion. *Epperson v. Arkansas*, 393 U. S. 97, 104 (1968); *Torcaso v. Watkins*, *supra*, at 495; *Everson v. Board of Education*, 330 U. S. 1, 15 (1947); *Koster v. Sharp*, 303 F. Supp. 837, 844-5 (E.D. Pa. 1969); *Goguen v. Clifford*, 304 F. Supp. 958, 961-2 (D. N.J. 1969).

It is evident that what is "religious" is largely a question of labeling. Tolstoy, in commenting on the case of a Dutch conscientious objector who refused to affirm a Christian basis for his objection but simply said that the commandment against killing was "rooted in human nature, in the mind of men," said:

[H]e says he is not a Christian. But the motives of his refusal and action are Christian. He refuses because he does not wish to kill a brother man—because the commands of his conscience are more binding upon him than the command of man \* \* \* Thereby he shows that Christianity is not a sect or creed which some may profess and others reject; but it is naught else than a life's following of that light of reason which illumines all men \* \* \*

Those men who now behave rightly and reasonably do so, not because they follow prescriptions of Christ, but because that line of action which was pointed out

eighteen hundred years ago has now become identified with human conscience. *TOLSTOY, The Beginning of the End* (1897), *TOLSTOY ON CIVIL DISOBEDIENCE AND NONVIOLENCE* 14 (1967).

This Court in *Seeger* emphasized that in determining an individual claim for conscientious objection, it is the sincerity and strength of the belief rather than the source which must be given primary recognition. 380 U.S. at 186. Yet, the form which an applicant for conscientious objection must fill out and submit to his local draft board contains questions concerning the origins of the applicant's beliefs. A. 231. An individual who states that he is non-religious and that his beliefs come from reading the great humanistic works of philosophers is dismissed as having a purely moral or philosophical code. An individual who reads current events as reported in the media and who believes that his military service could require him to inflict casualties on innocent civilians who happen to be in a "free fire zone" can reasonably conclude that his military service may involve violence to his conscientious scruples against the taking of life. Yet the likelihood is that he will be labeled a "political" objector and that his application for conscientious objector status will be denied. In short, any belief that does not square with a particular draft board's conception of religion can be and is labeled non-religious or political or a personal moral code.

We contend that it is not within the constitutional power of the government to involve itself in determining who the "religious" are. See *Presbyterian Church in United States v. Mary Blue Hull Memorial Presbyterian Church*, 393 U. S. 440 (1969).

The operation of Section 6(j) of the Act tends to place a premium not on the sincerity and strength of the applicant's beliefs and the extent to which his views play a role parallel to those of members of traditional churches but rather on his being a follower of court decisions who is able to restrict his answers to the magical phrases the decisions seem to require.

Any attempt to classify the deeply held moral convictions of conscience as lying outside of the sphere of the First Amendment must necessarily place the Government in the role of distinguishing beliefs and faiths—granting protection to some and withholding it from others. We submit that in order to avoid the constitutional issues raised by an interpretation of the “religious training and belief” clause which would exclude *Sisson*, this Court should construe the law so as to give full scope to the doctrine that religious freedom under the First Amendment cannot be restricted to orthodox beliefs. At the same time such a construction would avoid “an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497 \* \* \* [1954].” *United States v. Seeger, supra* at 188 (concurring opinion of Mr. Justice Douglas). See also *United States v. Bowen, supra*.

Philosophers, theologians and scholars have been no more successful than legislatures or courts in endeavoring to define religion or to distinguish a religious motivation from a conscientious scruple. Freedom of religion and freedom of conscience are terms which, in our constitutional history, have often been used interchangeably.

As Chief Justice Burger, writing for the Court of Appeals, said in *Washington Ethical Society v. District of Columbia*, 249 F. 2d 127, 129 (D.C. Cir. 1957):

Reference to standard sources of definitions discloses that the terms 'religion' and 'religious' in ordinary usage are not rigid concepts. Indeed, the definitions in these standard works taken together are by no means free from ambiguity. Some definitions would include only the Christian religion. Some call for belief in and worship of a divine ruling power or recognition of a supernatural power controlling man's destiny. But also included in these definitions is the idea of 'devotion to some principle, strict fidelity or faithfulness; conscientiousness, pious affecting or attachment.'

The Court of Appeals for the Eighth Circuit, in *United States v. Levy*, — F. 2d — (No. 19,507, Decided Dec. 8, 1969), pointed out that "[a]dmittedly the parallelism test of the *Seeger* case may significantly reduce the vitality of the personal moral code test, to the extent that pacifistic beliefs, if sincerely and deeply held may be defined as religious regardless of their source \* \* \* Perhaps this is necessary to avoid constitutional objections \* \* \*" (P. 14 of slip-sheet opinion).

The Court went on to cite with approval the following comments:

[I]s the product of one man's unaided reason superior to another's because he chooses to call it religion rather than *conscience or morality*? And if not, what ground can there be, other than a verbal one, for distinguishing one reasoned conclusion from another? It seems ironical to discriminate against those who share one of man's highest impulses—an unwillingness to take the life of his fellow man—because it springs from

reason, and not from the presumed command of some supernatural power. \* \* \*

Separating one source of belief from another seems principally an exercise in conceptualism; certainly it is in the highest degree perplexing. No universally acceptable touchstone is known which enables one to separate religion from ethics or morals or philosophy, and the search for one is about as rewarding as efforts to square the circle. Brodie and Southerland, *Conscience, The Constitution, and the Supreme Court: The Riddle of United States v. Seeger*, 1966 WIS. L. REV. 306, 329, 308.

Another question presented by the instant case is that of opposition "to participation in war in any form." Does this language compel the drafting of men like Sisson, whose conscientious sincerity is unquestioned? The District Court found such a result unconstitutional, and we agree. We think that result would violate the First, Fifth and Ninth Amendments to the Constitution, as discussed in Point II, *infra*. We suggest, however, that this is not an inevitable result, but one that can be avoided if the statutory language referring to "participation in war in any form" is construed and applied, as we submit it should be, to mean participation in any form in the war presently being fought.

"The test is not whether the registrant is opposed to all war, but whether he is opposed \* \* \* to participation in war." *Sicurella v. United States*, 348 U. S. 385, 390 (1955). Thus the statute does not require opposition to every war or complete pacifism on the part of the individual. *Sicurella v. United States*, *supra*; *United States v. Geary*, 379 F. 2d 915, 920 (2d Cir.) *cert. den.*, 388 U. S. 959 (1967); *Taffs v. United States*, 208 F. 2d 329, 331 (8th Cir. 1953), *cert. den.*



347 U. S. 928 (1954). The term "selective" objector is sometimes used as a pejorative for the objector who is said to wish to "pick and choose" his wars. But this is an unrealistic characterization. No individual is ever offered a number of wars in which he may wish to participate so that he may pick some and oppose others. By the same token no individual is actually faced with an opportunity to "select" a war for the purpose of objecting to it. Therefore, the statute should not be construed or applied to require hypothetical moral judgments on *all* wars. We believe, rather, that the statute is satisfied if there is an opposition derived from the dictates of conscience to any participation in the military based upon the realities of *this* war.

"Selective" conscientious objection does not necessarily mean an objection solely to the war in Vietnam.

Clearly, the selective conscientious objector would also object to a war later in time but similar in all respects to the one under discussion. Thus, his objection is not based solely upon the expediency of a specific war but to all wars of that kind which he believes to be unjust. Cohen and Greenspan, *Conscientious Objection, Democratic Theory and the Constitution*. 29 U. PITT. L. REV. 289, 399 (1968).

Vietnam has been described by Robert McNamara, former Secretary of Defense, as "the kind of war we'll most likely be facing for the next 50 years," FINN (ed.), *A CONFLICT OF LOYALTIES*, xiii (1968). It is clear from the record that Sisson's objections would apply not only to this one particular war but equally to other wars which violate his deeply-held convictions regarding freedom and the sanctity of human life. A. 152.

The Government contends that "opposition to a particular war, no matter how sincerely and morally motivated, *necessarily* involves a political judgment" (Brief at 47, emphasis added). However, as the District Court observed:

Nor was Sisson motivated by purely political considerations. Of course if 'political' means that the area of decision involves a judgment as to the conduct of a state, then any decision as to any war is not without some political aspects. 297 F. Supp. at 905.

We submit that under a broad construction of the statute, as in *Seeger*, Sisson's conscientious objection is entitled to recognition. Unless so construed, the statute violates the First, Fifth and Ninth Amendments.

## POINT II

**Conscientious objection to participation in war is an individual right protected by the First, Fifth and Ninth Amendments.**

The Government concedes that the power of Congress granted by Article I, Section 8 of the Constitution to raise and maintain armies is limited by the Bill of Rights and that Congress, in conscripting persons for military service may neither "invidiously discriminate against any class or person" (Brief at 40) nor "act in a way which deprives a person of religious freedom or establishes a religion in violation of the First Amendment" (Brief at 43). We submit that the Congressional power is limited by and subject to the right of individual conscience under the Ninth as well as under the First and Fifth Amendments. See *United States v. Robel*, 389 U. S. 258, 264 (1967).

**A. Our history confirms the right of conscience as a fundamental right reserved to the individual.**

Jefferson struck the keynote of our historical tradition relative to the right of conscience when he said:

[O]ur rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. JEFFERSON, *Notes on Virginia* (1782), *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 275 (Ed. Koch & Peden, Mod. Lib. 1944).

The reason for this, as Madison put it, is that these rights, in our Constitutional theory, are "unalienable," i.e. in such matters "no man's right is abridged by the institution of Civil Society." Madison, *Memorial and Remonstrance against Religious Assessments* (1785), appendix to *Everson v. Board of Education*, 330 U. S. 1, 63, 64 (1947). This view found its way into the Declaration of Rights of Virginia (1776)—"the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual". *Everson, supra* at 34 (dissenting opinion).

Thus, among the "great rights of mankind" submitted by James Madison to the First Congress was one which provided that "no person religiously scrupulous shall be compelled to render military service," 1 *Annals of Congress* (Gales and Seaton's Hist.) 451, Debate of June 8, 1789. The proposal reflected what was, even at that time, a longstanding American tradition. See Antieau, Carroll and Burke, *RELIGION UNDER THE STATE CONSTITUTIONS* 116 (1965); Conklin, *Conscientious Objector Provisions: A*

*View in the Light of TORCASO v. WATKINS*, 51 GEO. L. J. 252, 257-8 (1963); Cohen and Greenspan, *supra*, at 390-6. Indeed, the First Continental Congress had reaffirmed the right even in its darkest days. Resolution of July 18, 1775, cited in Conklin, *supra*, at 256-7.

The Congressional debates on these proposals are sparse. The outlines of the general argument are, however, clear. Hamilton, in *THE FEDERALIST PAPERS*, No. 84 (Rossiter ed. 1961) 513-4, felt that a Bill of Rights was superfluous to a government founded upon the consent of the people, especially a government established "to secure the blessings of liberty \* \* \*." He found a positive "danger" in a Bill of Rights since they would "contain various exceptions to powers which were not granted; and, on this very account, would afford a colorable pretext to claim more than were granted." *Ibid.* Jefferson's view prevailed "that a bill of rights is what the people are entitled to against every government on earth, general or particular \* \* \*" (Letter to James Madison, December 20, 1787, JEFFERSON, *supra*, at 438).

The paring down of Madison's list led some to fear that the omission of any items proposed might create an inference that only the enumerated rights would be protected. Representative Boudinot of New Jersey, commenting on the proposal to exempt conscientious objectors from military service, declared not only that the clause was "necessary" but added his concern that "by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to

bear arms." I Annals of Congress 796, Debate of August 21, 1789.

It was to meet such objections that Madison proposed what became the Ninth Amendment. See I Annals of Congress 456, Debate of June 8, 1789; *Cf. Griswold v. Connecticut*, 381 U. S. 479, 488-90 (1965) (concurring opinion).

Sectarian pacifist groups believed that the Constitution had secured their permanent exemption from bearing arms. The view of the Society of Friends in 1795 was that the right was grounded in the Free Exercise Clause. SCHLISSEL (ed.), *CONSCIENCE IN AMERICA* 49 (1968). "A Memorial of the Society of People commonly called Shakers, \* \* \*" in 1810 contained this statement:

In all free governments it is acknowledged as a self-evident truth, that the liberty of conscience is an inalienable right; consequently no human authority has a right to claim any jurisdiction over the conscience, either to control or interfere with its sacred requirements in any manner or under any pretence whatever.

And it is well known that compulsion in matters of conscience is entirely contrary to those liberal principles laid down by those venerable patriots of freedom who formed and established the fundamental laws of our State and Nation.

According to these well known and generally acknowledged principles of liberty, we are persuaded that nothing more can be required, than a *full proof of sincerity*, to entitle any individual or society of people to the full enjoyment of any principle of conscience which in its nature can do no moral injury to others. *Id.* at 73.



With this history and tradition as background, Congress undeviatingly, throughout our history, has enacted conscientious objector statutes in one form or another. See Conklin, *supra* at 259-60; *United States v. Seeger*, *supra* at 170-71.

When Congress, in the Selective Draft Act of 1917 (Act of May 18, 1917, ch. 15, §4, 40 Stat. 76, 78), attempted to narrow the exemption to persons affiliated with historic peace churches, President Wilson broadened it to include those "who object to participating in war because of conscientious scruples." Executive Order No. 2823, March 20, 1918. Harlan Fiske Stone (later Chief Justice Stone), writing on the conclusions reached by a World War I Board of Inquiry on conscientious objectors of which he was a member, observed:

All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation in the hands of the State. \* \* \* \*

While conscience is commonly associated with religious convictions, all experience teaches us that the supreme moral imperative which sometimes actuates men to choose one course of action in preference to another and to adhere to it at all costs may be dissociated from what is commonly recognized as religious experience. Stone, *The Conscientious Objector*, 21 COLUM. U. QTLY. 253, 269, 263 (1919).

This history and tradition led Chief Justice Hughes to state, in *United States v. Macintosh*, 283 U. S. 605, 634 (1931) (dissenting opinion):

[I]n the forum of conscience, duty to a moral power higher than the state has always been maintained.

Hughes (joined by Justices Brandeis, Holmes and Stone) observed:

The importance of giving immunity to those having conscientious scruples against bearing arms has been emphasized in debates of our government, and religious scruples have been recognized in draft acts \* \* \* I agree with the statement in the opinion of the Circuit Court case that 'this Federal legislation is indicative of the actual operation of the principles of the Constitution, that a person with conscientious or religious scruples need not bear arms, although as a member of society he may be obliged to render services of a non-combatant nature.' *Id.* at 633.

When this Court, in *Girouard v. United States*, 328 U. S. 61 (1946), overruled the holding of *Macintosh, supra*, that conscientious objectors could on that account be denied naturalization, Mr. Justice Douglas pointed out:

The struggle for religious liberty has through the centuries been an effort to accomodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. 328 U. S. at 68.

**B. The Free Exercise Clause of the First Amendment requires that religious objectors be exempted from military service. The Establishment Clause requires that this exemption apply to all conscientious objectors.**

If, as we submit, Sisson's conscience cannot be distinguished from Seeger's and is equally entitled to be considered "religious," the Free Exercise Clause of the First Amendment would be violated if Sisson's conscientious objection is not recognized. It is most important that we "not confuse the issue of governmental power to regulate or prohibit conduct *motivated by religious beliefs* with the quite different problem of governmental authority to compel behavior *offensive to religious principles*." *Abington School Dist. v. Schempp*, 374 U. S. 203, 250 (1963) (concurring opinion of Mr. Justice Brennan). See also Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 VA. L. REV. 1355, 1390 (1968); Brodie and Southerland, *supra*, 1966 WIS. L. REV. at 321; Stone, *supra* at 268.

Violation of the Free Exercise Clause "is predicated on coercion." *Schempp, supra* at 223. As no greater coercion than forcing a person to act—indeed to kill—in violation of his conscience can be imagined, it follows that the Government's attempt to make Sisson choose between the army and jail "invades the sphere of intellect and spirit which it is the purpose of the First Amendment \* \* \* to reserve from all official control." *West Virginia Bd. of Educ. v. Barnette*, 319 U. S. 624, 642 (1943). See White, *Processing Conscientious Objector Claims: A Constitutional Inquiry*, 56 CALIF. L. REV. 652, 662 (1968).

We suggest that the fundamental Free Exercise obstacle to requiring Sisson to accept military conscription is not a matter of balancing but rather a matter of whether government can force a person to take part in a war, force him to kill other human beings, when his conscience, which stands in the place of another man's God, commands him not to do so. In *Barnette, supra*, this Court forbade the state from forcing school children to salute the flag in violation of the dictates of their religion. We believe the dictates of Sisson's conscience in this case demand no less.

If this Court concludes that Sisson's conscientious objection is not "by reason of religious training and belief" within the meaning of the statute, then we think it is impossible to avoid the conclusion that the statute contravenes the Establishment Clause of the First Amendment, by preferring "religious" conscientious objectors to non-religious conscientious objectors. As pointed out above the right of conscientious objectors not to be required to bear arms is a right recognized by the Framers of the Constitution as a right protected by the Bill of Rights. To condition that right upon the objector's being religious would violate the required Governmental neutrality between the religious and the non-religious by establishing and attaching a religious condition to the right of conscientious objection.

During its last term, this Court again reaffirmed the doctrine that "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U. S. 97, 104 (1968). As the Court said in *Everson*,

*supra* at 15, the government may not "pass laws which aid one religion, aid all religions, or prefer one religion over another." Nor may the government "constitutionally pass laws or impose requirements which aid all religions as against non-believers." *Torcaso v. Watkins*, *supra* at 495.

Surely, if a non-"religious" person cannot be excluded from holding government office by reason of his failure to affirm belief in God, a non-"religious" person whose conscience impels objection to military service cannot be excluded from the class of those exempted from compulsory military service. See Conklin, *supra* at 277.

These are matters which must be left for definition "to the conviction and conscience of every man." Madison, *Memorial and Remonstrance*, *supra*, in *Everson*, *supra* at 64. "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 13 Wall 679, 728 (1872). The resolution, therefore, can *only* be a personal one. It follows from this also that any effort legislatively to exclude "political" or "moral" judgments from the composition of an individual's conscience are on their face arbitrary and discriminatory. Thus to exclude *Sisson* because of the nature of his objection, we submit, constitutes an impermissible discrimination in favor of certain forms of religious belief over others, in violation of the Establishment Clause. See *Engel v. Vitale*, 370 U. S. 421 (1962); *Abington School District v. Schempp*, *supra*. Failure to allow the exemption on this basis would constitute "hostility, not neutrality." *Schempp*, *supra* at 299 (concurring opinion of Mr. Justice Brennan).



**C. Failure to recognize Sisson's conscientious objection would violate a fundamental right of conscience protected by the Fifth and Ninth Amendments.**

It is abundantly clear, both from the historical materials and from the very context of American democracy, that the right not to be forced to act in violation of conscience is among those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934). This Court has long acknowledged that "the concept of liberty protects those personal rights that are fundamental and is not confined to the specific terms of the Bill of Rights." *Griswold v. Connecticut*, *supra* at 486 (concurring opinion). The scope of these rights "is one not of words, but of history and purposes." *Poe v. Ullman*, 367 U. S. 497, 542-3 (1961) (dissenting opinion of Mr. Justice Harlan). The rights are those "which are \* \* \* fundamental; which belong \* \* \* to the citizens of all free governments,' \* \* \* for 'the purposes [of securing] which men enter into society.'" *Id.* at 541. The fact that the Framers of the Constitution intended such a flexible view of "liberty" is given strong support by the addition of the Ninth Amendment. *Griswold*, *supra* at 493 (concurring opinion).

What we are concerned with here—the right not to be forced to act in violation of conscience—is as basic an individual right as any explicitly enumerated in the Constitution. It is part of the liberty guaranteed by the due process clause of the Fifth Amendment, or one of the reserved rights explicitly safeguarded by the Ninth Amendment. The entire constitutional framework is implicit with the recognition of such a right.

"Liberty" under the Fifth Amendment has been held to include rights far less vital to freedom than the right not to be forced to kill in violation of conscience: e.g., *Aptheker v. Secretary of State*, 378 U. S. 500 (1964); *Meyer v. Nebraska*, 262 U. S. 390 (1923); *Pierce v. Society of Sisters*, 268 U. S. 510 (1925).

Relying on the reservation of rights clause of the Ninth Amendment, Mr. Justices Goldberg and Brennan and Chief Justice Warren reached, in *Griswold*, the same result reached for the Court by Mr. Justice Douglas on the basis of a spectrum of rights and reached by Mr. Justice White and Mr. Justice Harlan on the basis of the Fifth Amendment.

We submit that there is a fundamental constitutional right of conscience—in the sense of freedom from being compelled to participate in war in violation of conscience, whether it be found in the Fifth Amendment, the penumbra emanating from the whole constitutional scheme, or in the reservation of rights guarantee of the Ninth Amendment.

As Chief Justice Stone wrote in 1919:

However rigorous the state may be in repressing the commission of acts which are regarded as injurious to the state, it may well stay its hand before it compels the commission of acts which violate the conscience \* \* \*

That any considerable number of our citizens at a time when we were making our supreme national effort should defy our laws and refuse to participate in it is a serious matter; but the violation of the conscience of the individual by majority action is likewise a serious matter, \* \* \* Stone, *supra*, at 268, 269.

As Professor Redlich put it in a recent address to the New York Society for Ethical Culture:

"The kind of society we are in is frequently reflected in the kinds of things we cannot compel a person to do. We do not compel a person to confess to a crime. We have long since abandoned the practice of compelling young men and women to marry—a practice still followed in parts of the world. We do not compel a person to work against his will. We do not compel a person to be an executioner. No government on earth—least of all a democratic government—has a right to compel violence and killing from its citizens, even in a just cause, unless the citizen consents." Redlich, "The Draft, Individual Conscience and the Right Not to Serve," *The Ethical Platform* 8, May 25, 1969.

To possess a right of conscience only in a mold authorized by the government is to have no right at all.

[I]f the state rejects the claim of the selective conscientious objector it is in effect claiming the right to substitute collective moral or religious judgment for individual moral or religious judgment. In effect, the state would be deciding that the individual possesses the right to make only 'correct' moral judgments—'correct' as determined by the government or, perhaps, by majority vote. We believe that no American democratic state should or can claim the right to determine for one of its citizens which moral or religious judgments are correct and which are not, for, if the state does possess this right, is there any truly significant difference between democracy and totalitarianism. Cohen and Greenspan, *supra*, 29 U. PITT L. REV. at 401,

As the Court of Appeals for the Second Circuit said, in *United States v. Seeger*, 326 F. 2d 846, 854-855 (2d Cir. 1964):

\* \* \* the principal distinction between the free world and the Marxist nations is traceable to democracy's concern for the rights of the individual citizen, as opposed to the collective mass of society. And this dedication to the freedom of the individual, of which our Bill of Rights is the most eloquent expression, is in large measure the result of the nation's religious heritage.

The Government asserts that such a reading of the Constitution "would be wholly destructive of the orderly functioning of government and would undermine the essential integrity of the democratic process." Brief, p. 47. But the "integrity" of the democratic process is not undermined by the exercise of individual liberties, unless it can be said that such liberties exist only at the whim of the state or at the behest of the majority. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *West Virginia State Bd. of Educ. v. Barnette*, *supra*, 319 U. S. at 638. The existence and exercise of these rights "may not be submitted to vote; they depend on the outcome of no elections." *Ibid.*

The Government's concern for "order," moreover, runs contrary to the well-accepted principle that "order cannot be secured through fear of punishment for its infraction." *Whitney v. California*, 274 U.S. 357, 375 (1927) (concurring opinion of Mr. Justice Brandeis). "Those who won our independence by revolution were not cowards \* \* \*. They did not exalt order at the cost of liberty." *Id.* at 377.

Of course the functioning of government would be more "orderly" if there were no consciences to contend with—just as this would be the case were there no free speech or jury trial. But "order" cannot prevail over liberty, unless our scheme of government is to radically alter its fundamental premises. "That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion of Mr. Justice Holmes). We agree that there is a risk of disorder; but, as this Court recently observed, "Our Constitution says we must take this risk \* \* \*; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength \* \* \*." *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 508-9 (1969).

This Court cannot by any decision alter the conscience of John Sisson. We submit that the Government is required by the Constitution to respect it and is not permitted to violate it.

### Conclusion

We submit that following the principle of statutory construction enunciated by this Court in *Seeger*, the Military Selective Service Act of 1967 should be so construed and applied as to include Sisson's conscientious scruples against participation in the Vietnam war; that unless the statute is so construed and applied, it is (a) an unconstitutional discrimination against non-religious objectors and adherents of liberal religious persuasions such as that represented by *Amicus*, in violation of both the Establishment



and Free Exercise clauses of the First Amendment; (b) an arbitrary, unreasonable and impermissible classification in violation of the Fifth Amendment; and (c) a violation of the right of conscience reserved to the individual citizen by the Fifth and Ninth Amendments.

January, 1970.

Respectfully submitted,

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**IN THE**

**Supreme Court of the United States**

**October Term, 1969**

**No. 305**

**UNITED STATES OF AMERICA,**

*Appellant,*

*v.*

**JOHN HEFFRON SISSON, JR.,**

*Appellee.*

**On Appeal from the United States District Court  
for the District of Massachusetts**

**BRIEF FOR THE  
AMERICAN JEWISH COMMITTEE AS  
AMICUS CURIAE**

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## ARGUMENT

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IN THE  
**Supreme Court of the United States**  
October Term, 1969

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**No. 305**

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UNITED STATES OF AMERICA,

v.

*Appellant,*

JOHN HEFFRON SISSON, JR.,

*Appellee.*

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**On Appeal from the United States District Court  
for the District of Massachusetts**

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**BRIEF FOR THE  
AMERICAN JEWISH COMMITTEE AS  
AMICUS CURIAE**

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**Interest of the Amicus**

The American Jewish Committee was incorporated by Act of the Legislature of the State of New York in 1911. Although the chief reason for being of this organization is to prevent the infraction of the civil and religious rights of Jews, the American Jewish Committee has from its very inception been devoted to the attainment of civil and religious liberty for all Americans. In *Pierce v. Society of Sisters of the Holy Name*, 268 U. S. 510 (1925), for exam-

ple, we urged this Court to invalidate the anti-parochial school law which had been enacted by the State of Oregon. The rationale for this broad-gauged approach has been our conviction that Jews will be most free and most secure in a society in which freedom and security are assured to citizens of all faiths—as well as of none. The *amicus* agrees with the late Mr. Justice Jackson who said that the “day that this country ceases to be free for irreligion, it will cease to be free for religion—except for the sect that can win political power.” *Zorach v. Clauson*, 343 U. S. 306, 325 (1952).

While the constituency of the American Jewish Committee includes large numbers of people who worship God devoutly, this *amicus* does not subscribe to the view that government may accord preferential treatment to religious believers or discriminate in any manner against non-believers. To the contrary, it is our view that the constitutional principle of separation of church and state, which is adumbrated in the Establishment Clause of the First Amendment, mandates strict neutrality on the part of government as between religion and irreligion. Above all, we believe that freedom of conscience is sacrosanct.

Yet the Military Selective Service Act of 1967, §6(j) as amended 50 U.S.C.A. App. §456(j), which limits exemption from combat training and service to one “who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form,” clearly does accord preferential treatment to religious pacifists, as distinguished from non-religious pacifists. It is for this reason alone that the American Jewish Committee files this brief *amicus curiae* with the consent of the parties.

## Opinion Below

The opinion of the United States District Court for the District of Massachusetts is reported at 297 F. Supp. 902.

## Jurisdiction

On April 1, 1969, the District Court entered an order granting the appellee's motion in arrest of judgment on the ground that the statute in question (50 U.S.C. App. 462), which makes it a crime to refuse to submit to induction as ordered, could not constitutionally be applied to appellee. A notice of appeal to this Court was filed on April 23, 1969. 18 U.S.C. 3731 confers jurisdiction upon this Court to review on direct appeal a decision granting a motion in arrest of judgment on the ground that the statute on which the indictment is based is invalid.

## Question Presented

This brief is addressed solely to the narrow issue of whether the Military Selective Service Act of 1967, 50 U.S.C. App. §§451 et seq. (hereinafter sometimes referred to as the "Act"), when it is applied to compel military service by non-religious conscientious objectors but not by religious conscientious objectors, violates the mandate of the First Amendment that "Congress shall make no law respecting an establishment of religion, \* \* \*" as well as the requirement of the Fifth Amendment that "No person shall be \* \* \* deprived of life, liberty, or property, without due process of law; \* \* \*"

## Statute Involved

Section 4(a) of the Act, 50 U.S.C. App. §454(a) provides in pertinent part:

“The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States \* \* \* such number of persons as may be required to provide and maintain the strength of the Armed Forces \* \* \*”

Section 6(j) of the Act, 50 U.S.C. App. §456(j) provides in pertinent part:

“Nothing contained in this title \* \* \* shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term ‘religious training and belief’ does not include essentially political, sociological, or philosophical views, or a merely personal moral code \* \* \*”

Section 12(a) of the Act, 50 U.S.C. App. §462(a), provides in pertinent part:

“Any \* \* \* person charged as herein provided with the duty of carrying out any of the provisions of this title \* \* \* or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty \* \* \* shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both \* \* \*”



## Statement of the Case

The facts in the case are not in dispute. John Heffron Sisson, Jr. received an order from Local Board 114, Middlesex County, Massachusetts, to report for induction into the armed forces on April 17, 1968. Subsequently, although Sisson did report to the Boston induction center, he refused to accept induction.

Prior to this occurrence, on February 29, 1968, Sisson had written to his draft board, indicating that he was conscientiously opposed to military service and requesting the appropriate form to make claim for exempt status. However, upon receiving this form, Sisson did not execute it because he concluded that he was not entitled to exemption since his objection to military service was not a religious one. Rather it was rooted in his general moral, ethical and educational development over the years and, more immediately, in his particular perception that he could not in good conscience obey an order to serve in the war in Vietnam, which he deemed to be an illegal and immoral war. Sisson's sincerity is not in issue.

On March 21, 1969, a U.S. District Court jury in Boston returned a verdict that Sisson was guilty of unlawfully refusing to submit to induction, in violation of the Military Selective Service Act of 1967. Shortly thereafter Sisson filed a motion in arrest of judgment, *inter alia*, on First Amendment grounds. On April 1, 1969, Judge Charles E. Wyzanski, Jr. issued an order granting Sisson's motion, holding that the Act violates the "non-establishment" clause by discriminating between religious and nonreligious

conscientious objectors and violates the "free exercise" clause by compelling a conscientious objector to fight in an undeclared foreign war. The District Court rejected Sisson's contentions that Congress has no power to draft a conscientious objector, whether in time of peace or in time of war, that Congress has no power to conscript anyone during peace time, and that the District Court can have no jurisdiction of the offense charged if the legality of the Vietnam war is a political question. The District Court based its decision arresting the judgment of conviction for insufficiency of the indictment "upon the invalidity \* \* \* of the statute upon which the indictment \* \* \* is founded," within the meaning of this phrase as used in 18 U.S.C. §3731. On October 13, 1969, this Court noted probable jurisdiction.

### Summary of Argument

Today it is beyond dispute that the Establishment Clause of the First Amendment not only forbids government to aid religion, but also requires government to be neutral as between religion and non-religion. The truth of this proposition is attested to by a long line of case decisions which have emanated from this Court. The question arises, however, as to what constitutes aid to religion and as to when the mandate of governmental neutrality is flouted. This becomes a question of fact in any given situation.

Section 6(j) of the Military Selective Service Act of 1967 permits exemption from military service to persons who are opposed to war by reason of "religious training

and belief." It expressly excludes from the scope of these terms such views as are "essentially political, sociological, or philosophical." It excludes also a "personal moral code." In the common understanding of the language used in Section 6(j), the law accords a preference to religious pacifists. This, we maintain, represents aid to religion and is a manifest departure from the requirement that government be neutral as between religion and non-religion.

Aid to religion, in violation of constitutional stricture, cannot be justified on the ground of administrative convenience. Moreover, by no means has it been proven that a religious test for conscientious objectors actually is a more efficacious one than a different kind of test. The problem of the sincerity of an applicant must be resolved in each instance, regardless of the nature of the criteria for exemption. Assuming that exemption for conscientious objectors is a matter of legislative grace, rather than of right, such a privilege may not be extended in a manner which violates the Constitution.

To construe "religious training and belief" so broadly as to embrace an avowed agnostic, in the interest of upholding the constitutionality of the law, would tend to make the word "religious" virtually meaningless. If everything is "religious," then nothing is "religious." To render to "religious training and belief" the meaning which these terms truly deserve, thus excluding agnosticism or atheism, perforce must lead to the conclusion that this test is an unconstitutional one.

The Due Process Clause of the Fifth Amendment has been interpreted by this Court so as to prohibit unjustified

discrimination. Statutes which discriminate arbitrarily and unreasonably have been invalidated as being violative of the "equal protection" principle, which has been construed to be implicit in the Due Process Clause.

Clearly, Section 6(j) treats religious conscientious objectors differently than it treats non-religious conscientious objectors. Unless it can be shown that there is a constitutionally permissible basis for such a discrimination, this provision cannot stand. It is our contention that the Government has failed to demonstrate either the necessity, the fairness or the rationality of the existing criteria for exemption from military service.

## ARGUMENT

### POINT I

**The Military Selective Service Act of 1967, to the extent that it limits exemption from combat service to those who are opposed to war "by reason of religious training and belief," discriminates against non-religious objectors and therefore violates the Establishment Clause of the First Amendment to the United States Constitution.**

The First Amendment to the United States Constitution provides, in part, as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof \* \* \*"

The definitive exposition of the meaning of the Establishment Clause was articulated by this Court in *Everson*

*v. Board of Education*, 330 U.S. 1 (1947) in the following terms:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' " *Id.*, at 15-16. (emphasis added)

Both the majority and minority in *Everson* agreed in substance upon that definition. This Court noted such agreement in *McCullum v. Board of Education*, 333 U.S. 203, 210-211 (1948); and in *Torcaso v. Watkins*, 367 U.S. 488, 492-493 (1961) which upheld the right of a non-believer to hold public office. Whether or not that definition of the Establishment Clause was dictum in *Everson*, it indisputably became the *ratio decidendi* in *McCullum*, as acknowledged by this Court's opinion in *Torcaso*. That definition of establishment was reaffirmed in the opinion of the Chief Justice in *McGowan v. Maryland*, 366 U.S. 420,



443 (1961), and by the unanimous opinion of this Court in *Torcaso, supra*, at 492-3.

More recently, this Court, in the unanimous decision which declared unconstitutional an Arkansas law prohibiting the teaching of the doctrine of evolution in public schools, stated:

"Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 103-4 (1968).

Measured against these interpretations, it is difficult to perceive how Section 6(j) of the Act can withstand challenge under the Establishment Clause. Clearly this provision, whatever its rationale, permits the granting by government of a privileged status to religious believers which is denied to non-believers. We need not labor the point. The fact that Section 6(j) does aid religions is virtually a matter of *res ipsa loquitur*. It is no answer to this palpable constitutional infirmity to contend, as the Government does, that such a distinction is warranted because it "provided a manageable, tangible test susceptible of administrative and judicial application." (Jurisdictional Statement, p. 15). This argument amounts to an attempt to rationalize a triumph of expediency over constitutionality. But administrative convenience, in and of itself, is not adequate support for infringement of a constitutional

right. *Harrell v. Tobriner*, 279 F. Supp. 22, 30 (D.C. District of Columbia, 1967). As a matter of fact, it is even doubtful whether a religious conscientious objector test really is easier to apply. In both types of cases, religious and non-religious, draft boards must determine the sincerity of the applicants. A religious claimant has the comfort of accepted dogma and precedent to sustain him. His non-religious brother may have to pick his own way through uncharted waters. An insincere person seeking to avoid military service might find it easier to rest his exemption claim on a well-rehearsed religious base than on a non-religious one, assuming both courses were open to him.

We express no opinion as to whether Congress is constitutionally required to exempt conscientious objectors from military service. But we maintain that Congress, having determined to grant such an exemption, may not constitutionally require "religious training and belief" as the entrance charge for exemption. It has been said that granting exemptions to conscientious objectors is a matter of legislative grace. *Cannon v. U.S.*, 181 F. 2d 354 (9th Cir. 1950); *Hamilton v. Regents of University of California*, 293 U.S. 245, 246 (1934). Assuming that to be true, it by no means follows that such grace may be applied in an unconstitutional manner. *Speiser v. Randall*, 357 U.S. 513 (1958). From a First Amendment point of view, it is no more proper to base conscientious objector exemption on "religious training and belief" than it would be to limit such exemption only to members of the Mennonite Church, for example. The former favors religion generally, while the latter would favor a particular sect. Both, we submit, are equally prohibited by the Establishment Clause.

The Government maintains also that Section 6(j) does not violate the Establishment Clause because the wording of this provision does not reflect a congressional preference or prejudice for religion, but rather a judgment that religious conscientious objectors hold beliefs which are qualitatively different from those held by non-religious conscientious objectors. We believe that this argument, even if it were true, is essentially irrelevant since the touchstone of constitutionality is not necessarily wording or legislative intent, but rather the practical effect of the statute in question (*Terry v. Adams*, 345 U.S. 461 (1953)) which, in the case of Section 6(j), is to confer a benefit upon religion. Moreover, it is generally recognized that the objections to war of a non-religious conscientious objector may be as deeply felt and as sincerely held as those of one who is religiously motivated. In any event, the sincerity of the applicant is one of the principal problems that draft boards and courts must resolve in these cases, even under the present language of the statute.

Does Section 6(j) of the Act contravene the Establishment Clause? That question was left undecided by this Court in *U.S. v. Seeger*, 380 U.S. 163 (1965). In *Seeger*, the Court found it unnecessary to reach the issue of constitutionality because of its broad construction of the language in question.<sup>1</sup> We believe, however, that to stretch "religious training and belief" to encompass the philosophy of the appellee in this case, who is an avowed agnostic,

1. In an article entitled "Defining Religion: Of God, the Constitution and the D.A.R.", 32 University of Chicago Law Review 539, Spring 1965, Robert M. Berger observes "If one reads between the lines, *Seeger* is further authority that nontheism cannot be excluded from a constitutionally permissible definition of religion."

would improperly distort the plain meaning of words. The question above deserves to be answered in the affirmative, irrespective of whether or not Sisson is entitled to exemption as an objector to participation in the Vietnam conflict.

## POINT II

**The Military Selective Service Act of 1967, to the extent that it limits exemption from combat service to those who are opposed to war "by reason of religious training and belief," discriminates against non-religious objectors and therefore is an arbitrary and unreasonable classification which violates the Due Process Clause of the Fifth Amendment to the United States Constitution.**

Initially, conscientious objector status was granted only to members of pacifist sects. This was broadened in 1940 to include claimants whose opposition to war was based on "religious training and belief." *U.S. v. Seeger, supra*, at 171. In *Seeger*, it was broadened to encompass informal and unorthodox "religious" beliefs, developed outside of formal religion based, in part at least, on philosophical writings, for instance, "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed" (*Ibid.*, p. 166).

The limitation of conscientious objector status to those whose objections arose by reason of "religious training and belief" reflected the legislative preference for or discrimination in favor of religious persons. It is noteworthy that the reference is not merely to religious belief, but is

joined with the training requirement. This would ordinarily appear to require a formal and active participation in religious observance and educational preparation. Nevertheless, *Seeger* in effect has eliminated the content from the "religious training" element of the test. All that remains is a vague and indefinite test of sincere beliefs, perhaps with some semblance of a religious basis for these beliefs, such as a religious home or religious writings (*Seeger*, at 186). In short, some applicants for exemption may qualify, while others may not. The line of demarcation is blurred.

Such discrimination is arbitrary, unreasonable and constitutes a denial of equal protection and due process of law in violation of the Due Process Clause of the Fifth Amendment to the Constitution. See the concurring opinion of Mr. Justice Douglas in *U.S. v. Seeger, supra*, at 188. While the Fifth Amendment does not include an "equal protection" clause, it is clear that its Due Process Clause has been construed to bar unjustifiable discrimination. *Shapiro v. Thompson*, 394 U.S. 618 (1969). In *Seeger*, Mr. Justice Douglas referred to discrimination between "religions" as being an unconstitutional denial of due process. It is equally true that discrimination between persons like Seeger and Peter, whose views would not be considered "religious" in the ordinary sense of the word, and Sisson, whose views, while not self-characterized as religious, are of a religious nature (as stated by the District Court below) would be an unconstitutional denial of due process.

Is there a meaningful distinction between the views expressed by Seeger in *U.S. v. Seeger, supra*, at 166 or



Peter at 169, on the one hand, and those of ~~Sisson~~ on the other? It is very hard to find any. To say that Seeger's and Peter's views are "religious," while Sisson's are not, is to draw a distinction without a difference. While Sisson concedes that he is a non-religious conscientious objector, it is unclear wherein his beliefs differ in kind from those required under the "objective" test enunciated in Seeger:

"\* \* \* Does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?" *U.S. v. Seeger, supra*, at 184.

As the District Court below pointed out:

"Sisson \* \* \* was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion." *U.S. v. Sisson*, at 905.

One view of the matter was set forth quite clearly in *George v. U.S.*, 196 F.2d 445, 450 (9th Cir. 1952), cert. den., 344 U.S. 843 (1952) where the Court said:

"\* \* \* the Congress is free to determine the persons to whom it will grant [the exemption] and may deny it to persons whose opinions the Congress does not class as 'religious' in the ordinary acceptance of the word."

But this Court has recognized that discrimination may be so unjustifiable as to be violative of due process. *Bolling v. Sharpe*, 347 U.S. 497 (1954), dealt with racially segregated public schools in the District of Columbia. "Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that

constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause" (*Id.*, p. 500). While the discrimination involved in *Bolling* was racial, religious discrimination is equally insupportable.

Another case which is highly germane is *Schneider v. Rusk*, 377 U.S. 163 (1964), in which this Court held that the section of the Naturalization Act, which deprived naturalized citizens of citizenship if they returned to their country of origin for a period of three consecutive years, breached the Due Process Clause of the Fifth Amendment because no such restriction applied to native-born citizens. All of the Justices who participated in that case agreed on the principle that the Due Process Clause forbids arbitrary discrimination, the majority and the dissenters parting company only as to whether there was a reasonable basis for the discrimination at bar. Both *Bolling* and *Schneider* serve to buttress our contention that discrimination against conscientious objectors who are non-believers is an unreasonable and impermissible classification which violates the Due Process Clause of the Fifth Amendment. The Government has failed to demonstrate that the discrimination in question is necessary to the proper administration of the draft law. See *Harman v. Forssenius*, 380 U.S. 528 (1965). The invidious distinctions inherent in Section 6(j) of the Military Selective Service Act of 1967 are not necessary, not fair and not rational. D

# Conclusion

For the reasons set forth herein, the judgment of the District Court arresting the appellee's judgment of conviction should be affirmed.

Respectfully submitted,

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January, 1970



**FILE COPY**

**IN THE**

**Supreme Court of the United States**

**October Term, 1969  
No 305**

**UNITED STATES OF AMERICA,**

*Appellant,*

*vs.*

**JOHN HEYTRON Sisson, Jr.**

**On Appeal From the United States District Court  
for the District of Massachusetts.**

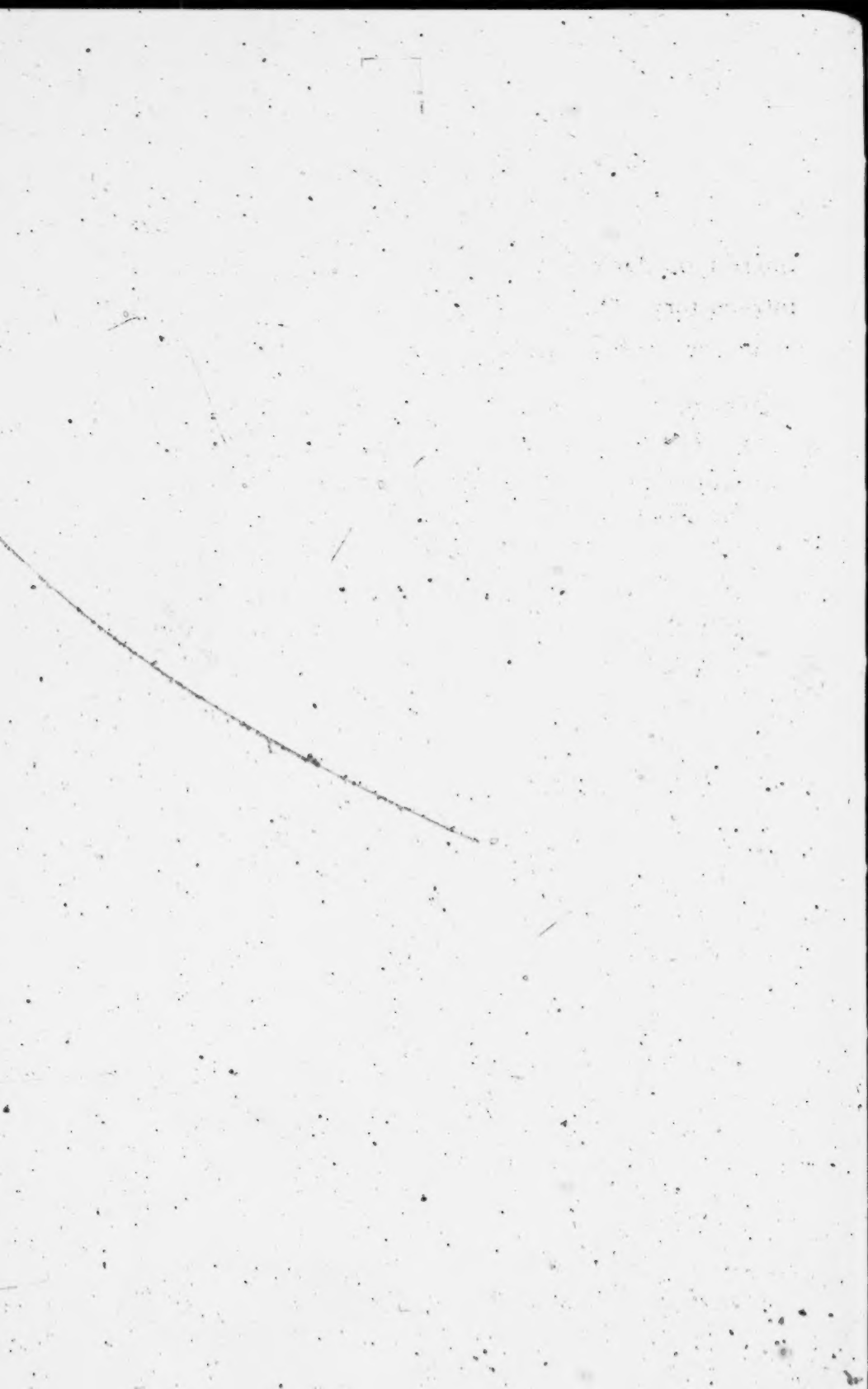
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IN THE  
**Supreme Court of the United States**

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October Term, 1969  
No 305

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

JOHN HEFFRON SISSON, JR.

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On Appeal From the United States District Court  
for the District of Massachusetts.

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Brief of the Los Angeles Selective Service Law  
Panel, Amicus Curiae.

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**Interest of Amicus.\***

The Los Angeles Selective Service Law Panel is a panel of over 100 attorneys in the Los Angeles community specializing in or practicing selective service law and litigation. The Panel was established in 1967 to render free assistance to individuals in need of counsel in selective service matters. Members of the panel aided over 5000 men during 1969, both in their capacities as Panel members and as attorneys retained by registrants. Panel members have personally litigated over

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\*Written consents by attorneys for both parties have been filed with the Clerk.

250 selective service cases and have been instrumental in re-shaping selective service law in the Court of Appeals for the Ninth Circuit.

Amicus has a particular interest in the development and application of constitutional law with regard to the Military Selective Service Act of 1967.

### Introductory Statement.

This is not the first time that Section 6(j) of the Military Selective Service Act (50 U.S.C. App. § 456 (j) (1969)), or its precursors, has been before this Court for consideration. In *United States v. Seeger*, 380 U.S. 163 (1965) this section was interpreted "in the candid service of avoiding a serious constitutional doubt." Douglas, J, concurring, 380 U.S. at 188. Once again questions of constitutional magnitude surround the controversy of the interpretation and application of the statutory exemption from military service of those conscientiously opposed to participation in war.

This brief of amicus will deal, however, with one narrow question: Has Congress, by enacting Section 6(j) of the Military Selective Service Act of 1967, which allows exemption from service only to those who hold conscientious opposition to participation in war in any form by reason of religious training and belief, contravened the First Amendment's prohibition against the establishment of religion. More specifically has Congress "pass[ed] laws which aid one religion, aid all religions, or prefer one religion over another." *Eversen v. Board of Educ.*, 330 U.S. 1, 15 (1947).

A

### Summary of Argument.

Amicus argues that the inherent conflict between the First Amendment's "free exercise" and "establishment" clauses (see *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 296 (1963) (concurring opinion of Brennan, J.)) requires an expansion of conscientious objector status to those who are conscientiously opposed to war other than by reason of religious training and belief. Otherwise so to hold creates advantages for those with religious training or religious belief as the basis for their conscientious opposition to participate in war, and also encourages participation in religious training and acceptance of religious dogma as the core for an individual's opposition to participation in war. Further, *amicus* argues that since Congress allows conscientious objector classification status to those opposed for religious reasons to all war, the exemption must constitutionally extend to those who are selective religious conscientious objectors and that the establishment clause will again require that the corresponding non-religious believer be granted the same classification as the religious believer in order not to violate the Constitution's command of "governmental neutrality between religion and non-religion." *Epperson v. Arkansas*, 393 U.S. 97, 103-4 (1968).



## ARGUMENT.

**THE CONSTITUTION REQUIRES THAT CONSCIENTIOUS OBJECTOR CLASSIFICATIONS BE GIVEN TO NON-RELIGIOUS SELECTIVE CONSCIENTIOUS OBJECTORS IN ORDER TO AVOID AN "ESTABLISHMENT" OF RELIGION.**

### Introduction.

Congress has granted to religious conscientious objectors exemption from military service in section 6(j) of the Military Selective Service Act of 1967. Whether this legislation was motivated by a belief by Congress that such an exemption was constitutionally required<sup>1</sup> or not is not meet for this brief to discuss.<sup>2</sup> Congress has granted such exemption and, unless it is unconstitutional in and of itself, the grant of exemption to religious conscientious objectors has created its own realities because this Court has interpreted the "establishment" clause of the First Amendment to require that "[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster or promote one religion or religious theory against another or even against the militant opposite. The First

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<sup>1</sup>Despite the case law, which seems to adopt a "legislative grace" theory, in light of the current interpretations of the First Amendment, this is an open question: See MacGill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 Va. L. Rev. 1355, 1386-93 (1968).

<sup>2</sup>If the conscientious objection exemption is constitutionally required, grave constitutional questions over the current administration of the Selective Service System are tendered and may require extensive modifications of that system. See, e.g., White, *Processing Conscientious Objector's Claims: A Constitutional Inquiry*, 56 Calif. L. Rev. 549 (1968) for an extensive analysis.

Amendment mandates governmental neutrality between religion and religion and between religion and non-religion." *Epperson v. Arkansas*, 393 U.S. 97, 103-4 (1968). Even if it is believed that the "free exercise" clause of the First Amendment *requires* a statute of the temper of Section 6(j) of the Military Selective Service Act of 1967, this still does not create the situation which Mr. Justice Brennan fears might occur as expressed by his concurring opinion in *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 296-99 (1963), which is that when "free exercise" is at stake, the "establishment" clause of the First Amendment is muted by the greater interest. In the *Schempp* case, Justice Brennan states that there "are certain practices, conceivably violative of the Establishment Clause, which might seriously interfere with certain religious liberties also protected by the First Amendment." He cites as examples the provision of chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion and the granting of draft exemptions for ministers and conscientious objectors. But a distinction is vital. The "free exercise" interest mutes the "establishment" interest *only when there are no other alternatives*. For example, chaplains are provided for prisoners and soldiers by the Government because there is only one other alternative available. Allowing chaplains to soldiers and prisoners *vel non* is an all or nothing proposition. Allowing exemptions to ministers so that they may preside over their congregations, *vel non*, is also an all or nothing proposition. Allowing conscientious objector exemptions because impelled by the First Amendment "free exercise" clause would not derogate the "establishment" clause and render it mute. The al-

ternative of denying all conscientious objector exemptions and consequently "free exercise" is not the only one available to the legislature, or if need be, to the judiciary. A less onerous alternative is also available: a provision allowing non-religious conscientious objectors to obtain conscientious objector exemptions. By extending the conscientious objector exemption to secular as well as religious conviction, the free exercise of religion could be protected and the separation of church and state maintained. Thus, whether the "free exercise" clause does or does not impel section 6(j) of the Military Selective Service Act of 1967, the results are the same and the "establishment" clause need not be muted. Therefore, this Court may adopt this position uniquely applicable to resolution in this instance, and avoid confrontation between the "free exercise" and "establishment" clauses of the First Amendment.

*See also, Conklin, Conscientious Objector Provisions: A View in Light of Torcaso v. Watkins, 51 Geo. L. J. 252 (1963).*

**A. Section 6(j) by Its Terms Provides Exemption for "Religious" "Non-Selective" Conscientious Objectors.**

Section 6(j) of the Act provides, in relevant part, that:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

The language of the Act and judicial gloss applied since this section of the Act was first interpreted in *United States v. Kauten*, 133 F. 2d 703 (2d Cir. 1943), in effect categorize four classes of conscientious objectors: (1) religious, non-selective conscientious objectors;<sup>3</sup> (2) religious, selective conscientious objectors;<sup>4</sup> (3) non-religious, non-selective conscientious objectors;<sup>5</sup> and (4) non-religious, selective conscientious objectors.<sup>6</sup>

The most recent explication of Section 6(j) by this Court dealt generally with the rights of religious, non-selective conscientious objectors, in *United States v. Seeger*, 380 U.S. 163 (1965). Despite disclaimers by the Court at *id.* at 173, this Court's broad definition of "religion" and "Supreme Being" may be read to encompass two distinct views. First, the definition may indeed vitiate any distinction between a "religious man" opposed to participation in war and a conscientiously moral atheist opposed to participation in war. See, e.g., *Conscientious Objectors: The Aftermath of United States v. Seeger*, 30 Albany L. Rev. 304, 311 (1966):

The Court implies that an atheist would not be able to meet the "parallel to God" test. Much of

<sup>3</sup>See, e.g., *United States v. Kauten*, 133 F. 2d 703 (2d Cir. 1943) denying a conscientious objector classification.


<sup>4</sup>See *United States v. Bowen*, (N.D. Cal., Dec. 24, 1969, Crim. No. 42499). The opinion of the court in *Bowen*, in the form of "Memorandum on Granting Motion for Judgment of Acquittal" is reprinted in full in the Appendix to this Brief.

<sup>5</sup>See *United States v. Schacter*, 1 S.S.L.R. 3272 (D. Md. 1968) and *Welsh v. United States*, No. 76, this Term.

<sup>6</sup>The issue presented in this case.

the difficulty comes from the various connotations given the term atheism. Dictionaries define it as merely a disbelief in or denial of God. Clearly this does not present a different problem because the court explains that Buddhists and others whose religions are not founded on a diety are not automatically disqualified under the statute. At the other extreme, if the term atheist means only those persons who resolutely deny the existence of God, and in addition profess to believe in nothing whatsoever, such persons would be unable to prove that they sincerely and conscientiously object to participation in war in any form because of an obligation to an authority higher to the state. Perhaps the court has in mind a man who holds some system of beliefs but disclaims any religious basis for them, no matter how broadly the term religion is interpreted.

Other commentators feel that the *Seeger* definition may mean that "... when any given set of beliefs assumes sufficient importance in any individual's life to impose upon him the duty of refraining from participation in any war at any time, he can fairly be said to be religious as that term is used in the statute." *Conscience, The Constitution, and The Supreme Court: The Riddle of United States v. Seeger*, 1966 Wisc. L. Rev. 306 (1966). See also Rabin, *When Is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 Cornell L.Q. 231, 242-43 (1966).





**B. The Due Process and Equal Protection Clauses of the Constitution Require That an Exemption Be Granted to a Religious Selective Conscientious Objector.**

Religious selective conscientious objectors present one of the two issues present in the instant case: selectivity. It should be pointed out that in the context of the American experience, the selective conscientious objector does not "pick" his war, but rather his beliefs determine whether he can participate in the particular war for which he is being inducted and expected to support in a military capacity. Instead, the selective conscientious objector manifests his beliefs, by refusing to submit to induction and by going to prison (see *United States v. Spiro*, 384 F. 2d 159 (3d Cir.) cert. denied 390 U.S. 956 (1968)), indicating his position that he can not fight in the particular war for which he is being drafted. Today that war is the military action in Viet-Nam.<sup>7</sup>

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<sup>7</sup>This is important because most pacifistic dogmatists of the world's major religions have fallen into disrepute among their contemporaries because the spectre of nuclear war has become an "all-or-nothing" affair for mankind which paints pacifism today as an "all-or-nothing" affair for the individual believer. See Potter, *Conscientious Objection to Particular Wars*, 4 Religion & Pub. Order 44, 75-76. Viet-Nam, however, provides dramatic proof that this is not the situation today, yet we may be so conditioned by nuclear war as to refuse to think otherwise. See H. Kahn, *On Thernonuclear War* (1960); *Thinking About the Unthinkable* (1962). That a conscientious objector would use self defense is not grounds for denial of the conscientious objection exemption. *United States v. Gearrey*, 379 F. 2d 915 (2d Cir.), cert. denied, 389 U.S. 959, rehear. denied, 389 U.S. 1010 (1967). This would seem to militate for a distinction between total and limited wars and between just and unjust wars. Cf. *Sicurella v. United States*, 348 U.S. 385 (1955). *United States v. Parimeter*, 173 F. Supp. 677 (S.D.N.Y. 1959). It should be noted that in 1918, Secretary of War Newton D. Baker ex-

(This footnote is continued on the next page)

The recent case of *United States v. Bowen* (D.C.-N.D. Cal., Dec. 24, 1969, Crim. No. 42499) (reprinted in full in Appendix), sets forth "due process" and "equal protection" rationales for including selective religious conscientious objectors among those to whom exemptions from service should extend. Bowen was a devout Catholic who believed that the Catholic Church distinguished between just and unjust wars and that his church prohibited him from participating in the Vietnamese conflict. Counsel adduced expert testimony that Bowen's belief of his church's doctrine was reasonable. This included a supporting letter from Rev. Terence O'Shaughnessy, O.P., Chairman, Theology Department, Aquinas College; testimony from Bernard De Primo, former Associate Professor of Philosophy at Aquinas College who had taught a course attended by Bowen on the Catholic teaching in respect to war; testimony by the Rev. James C. Straukamp, an ordained Catholic priest and member of the Society of Jesus; and stipulations by Bowen's counsel and the government that the Reverend Peter J. Riga, Professor of Theology at St. Mary's College, Moraga, California, and the Reverend William J. O'Donnell, Assistant Pastor, St. Joachim's Church, Hayward, California and Newman Club Chaplain at Chabot College were duly ordained priests in the Roman Catholic Church, qualified to testify to Catholic theology, doctrine and religious training and belief, and would testify to the same effect as Father Straukamp and Mr. De Primo.

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tended conscientious exemption from military service to selective (and non-religious) objections—at a time when the United States was fighting a total, but non-nuclear, war. L. Rothenberg, *You and the Draft* 188-89 (1968).

\* Father Straukamp in testifying, noted that the Catholic teaching of obedience to conscience did not lead to anarchy because in forming his conscience the Catholic is guided by the teaching of the church in matters of faith and morals. In forming conscience the Catholic is to give deference to the commands and laws of the state and its leaders, and may disobey the state only where the state commands acts which violate the commands of God. "Defendants Brief after Trial," *United States v. Bowen*, pp. 3-5. (See also footnote 1 of the court's opinion (page 2 slip opinion).) Bowen's sincerity that his religion must require him to abstain from participation in the Viet-Nameese war was unquestioned, and he cited scripture and Catholic Doctrine and Propaganda in support of his belief. *Id.* at pp. 3-6. In the face of this evidence, Bowen's counsel, Richard Harrington, Esq. of San Francisco, California, argued in "Defendant's Brief after Trial":<sup>8</sup>

"It appears fair to take defendant's sincerity as established, and that the defendant is honest in his religious motivation, without saying that other members of defendant's religion not taking Bowen's stand are any less sincere.

"As the Supreme Court held in *United States v. Seeger*, 380 U.S. at 184-185 (1965):

"Some theologians, and indeed some examiners, might be tempted to question the existence of registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government. \* \* \* Local boards and courts in this sense are not free to reject beliefs because they consider

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<sup>8</sup>Amicus hereby incorporates into its Argument that portion of the *Bowen* Brief printed herein.

them 'incomprehensible.' Their task is to decide whether the beliefs professed by a registrant are sincerely held, and whether they are in his own scheme of things, religious.

"For identical reasons, whether Bowen's beliefs are orthodox or shared by only some members of his religion is not of significance to constitutional protection of his religious belief:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *Board of Education v. Barnette*, 319 U.S. 625 at 641-42 (1943).

"Since Bowen's sincerity and the religious basis for his refusal of induction appear to be established, the remaining question is constitutional:

"Is the law constitutionally deficient in not allowing an individual to make his own choice and decision regarding the justice or injustice of a particular war, where the individual conscientiously believes that his religion prohibits participation in wars which his conscience finds unjust, but permits participation in other hypothetical wars which his conscience can conceive of as just?

"In deciding the foregoing constitutional questions, it is all-important to recall that Congress has exempted conscientious objectors of certain religions from military service. Section 6(f) of the Act. . . ."

"Thus, a sharp question of due process and equal protection of law arises when members of one religion—e.g. the Quakers—are exempted from criminal liability in refusing military service while members of another religion—Catholics—are held to be felons for conduct which is identical—refusing military service at the same time and place.

"It denies due process and equal protection of law to compel a Catholic conscientious objector to abandon one of the precepts of his religion as a condition to receiving the exemption from military service accorded to members of other religions.

"*Sherbert v. Verner*, 374 U.S. 398 at 402 and 404 (1963) holds:

"The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such. *Cantwell v. Connecticut*, 310 U.S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U.S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania*, 319 U.S. 105; *Follett v. McCormick*, 321 U.S. 573; cf. *Grosjean v. American Press Co.*, 297 U.S. 233. Page 402.

"Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following



the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. Page 404.

"It must be kept in sharp focus that in this case Bowen is not being charged with crime for his *conduct*—because section 6(j) provides and the government concedes that an orthodox, sincere Quaker or any total pacifist is entitled to refuse induction upon grounds of religious training and belief upon the same date and in the same place that Bowen refused induction.

"Thus, the charge against Bowen is not, for his conduct, but rather for his belief—more precisely that Bowen subscribes to a religion the doctrine of which does not condemn all war as necessarily unjust, but admits that Bowen as a Catholic might participate in some other war which he in conscience concludes to be just, although he is in religion bound to refuse to participate in the particular war in which he is asked to serve because he finds such participation contrary to conscience.

"That the difference relates to theology or doctrine—and not to conduct—becomes particularly clear from historical observation. A Quaker or any other total pacifist is free to change his mind at any time and elect to participate in a particular war which he comes to regard as particularly just. Many pacifists of the 1930's

volunteered for military duty and served in the front ranks in World War II against Hitler.

"When a Catholic and a Quaker each refuse induction into military service here and now based upon religious conscientious objection, the only fact that can be ascertained is that the refusal of each is based upon present religious scruple. It is sheer speculation to guess what either objector might do in another war, at another time and place and under other conditions.

"To attach penalties to the Catholic for conduct here and now identical to that of the Quaker is to penalize the Catholic solely for his doctrine—because his religious doctrine in theory admits that the Catholic might act differently in other circumstances, though the Catholic under his religion like the Quaker under his religion is compelled to refuse induction into military service at the time and place actually in question.

"Thus, upon analysis, it becomes clear that it is only the individual who can in any case make the decision to adhere to a particular religion such as the Society of Friends or the Roman Catholic Church or any doctrine of either, and that to adhere to or abandon a particular doctrine is no less a choice solely of the individual than is the choice of the Catholic the choice of an individual guided by his religion to render or to refuse military service in a particular war.

"The Supreme Court pointed the way for the courts to stay free of theological controversy by adopting an objective test in *United States v. Seeger*, 380 U.S. 163 (1965):

"We believe that under this construction, the test of belief 'in relation to a Supreme Being' is whether a given belief that is sincere and meaning-

ful in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in relation to a Supreme Being' and the other is not. 380 U.S. at 165-166.

"Continuing the Court points out:

"While the applicant's words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?

"Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight.

\* \* \* \* \*

"The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government. \* \* \* Local boards and courts in this sense are not free to reject beliefs because they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious. 350 U.S. 163 at 184-185.

"Let us apply the *Seeger* objective test to Bowen: Bowen believed that the laws of God, taught by his religion compelled him to refuse induction into [the] military . . . in 1968. Objectively considered, Bowen's belief occupies 'the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption.' *United States v. Seeger*, 380 U.S. at 184.

"Applying the objective test, both the orthodox Quaker clearly qualified for exemption and the Catholic like Bowen subscribe to the proposition that 'in the forum of conscience, duty to a moral power higher than the State has always been maintained.' *United States v. Seeger*, 380 U.S. 163 at 170, quoting Chief Justice Hughes dissenting in *United States v. Macintosh*, 283 U.S. 605 at 633.

"By adopting the objective test in *Seeger*, the Supreme Court corrected the error made by the majority in *United States v. Macintosh*, *supra*, which had to be overruled in *Girouard v. United States*, 328 U.S. 61 (1945). The dissenters in *Macintosh* protested the denial of citizenship to Macintosh, a Baptist minister and professor of theology at Yale, because:

"he was not willing 'to promise beforehand' to take up arms, 'without knowing, the cause for which my country may go to war' and that 'he would have to believe that the war was morally justified.' He declared that 'his first allegiance was to the will of god'; 283 U.S. at 629.

"Chief Justice Hughes stated in his dissent: "He was not willing 'to promise beforehand' to take up arms, 'without knowing, the cause for

"The foregoing paraphrase of *Sherbert v. Verner*, 374 U.S. 398 at 404 is not exact only because Bowen's constitutional objection is much stronger: Mrs. Sherbert was denied unemployment insurance by South Carolina for conduct—refusing to work on Saturday, her religious day of worship. By contrast, Bowen here is to be punished for doctrine: The government concedes he would be exempt from military service if here and now he only would disaffirm so much of Catholic theology and doctrine as admits that a hypothetical war can be conceived in which Bowen in just conscience could participate. Because Bowen is unwilling to give up his belief in the Catholic just war doctrine, the government contends he should be jailed as a felon. Such punishment for doctrine the First, Fifth and Fourteenth Amendments prohibit so long as Bowen's conduct is objectively no different from that of Quakers and members of other traditional pacifist religions clearly exempted from military service by Section 6(j).

"Section 6(j) should be construed to exempt Bowen and other selective conscientious objectors in the candid service of avoiding serious constitutional doubt.

"The Second Circuit held the draft act unconstitutional in requiring belief in a Supreme Being in *United States v. Seeger*, 326 F.2d 846 (2d Cir. 1964). The Supreme Court avoided the constitutional question by adopting an objective test of religious belief for application under the draft act. *United States v. Seeger*, 380 U.S. 163 (1965).

"The concurring opinion in *Seeger* noted the established rule of construction to construe an Act of Congress to save it from demise on constitutional grounds. In a more extreme case than the present one we said



that the words of a statute may be strained 'in the candid service of avoiding a serious constitutional doubt.' *United States v. Rumely*, 345 U.S. 41, 47. 380 U.S. at 188.

"The Court in *Rumely* referred to the foregoing rule of construction as a 'principle of wisdom and duty . . . .' 345 U.S. at 47.

"Turning to Section 6(j) of the Selective Service Act, it is at least worthy of note that the Supreme Court faced the question whether a conscientious objector must be opposed to all war. The court stated:

"The test is not whether the registrant is opposed to all war, but whether he is opposed on religious grounds to *participation* in war." *Sicurella v. United States*, 348 U.S. 385 at 388 (1955) (emphasis in original).

"The government has sought to distinguish *Sicurella* upon the ground that it involved a Jehovah's Witness who would fight only in a theocratic war. This distinction fails completely in respect of a Catholic, for Catholic theology explicitly holds that the duty of obedience to public authority arises when exercised in conformity to divine law only as a form of obedience to God, on the principle that because some form of political community and public authority are required in the nature of things, and thus belong to the order of things divinely foreordained so long as authority is exercised within the limits of divine law. *Pastoral Constitution on the Church in the Modern World*, Section 74; *Pacem in Terris*, paragraphs 46-48.

"Thus, by Catholic theology the Catholic may participate in war upon command of public authority only

when the command of public authority is in conformity to God's law and thus may be recognized as an expression of God's command.

"Theologically, in short, the Catholic like the Jehovah's Witness may participate in war only upon God's command.

"Next, the government cites *United States v. Kauten*, 133 F. 2d 703 at 708 (2d Cir. 1943):

"There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter and not the former, may be the basis of exemption under the Act.

"The court continues:

"The former is *usually* a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has been thought a religious impulse. 133 F. 2d at 708 [emphasis added].

"The government has not yet explained how dictum in the Second Circuit in 1943 can overcome the square holding of the Supreme Court in *Sicurella* twelve years later:

"The test is not whether the registrant is opposed to all war, but whether he is opposed on religious grounds to *participation* in war. 348 U.S. 385 at 388 (1955).

"In point of fact the defendant in *Kauten* was opposed to all war, whereas the defendant in *Sicurella*

was not opposed to theocratic war or war in defense of his religious brethren. The holding of *Kauten* is that political, as opposed to religious, objection is not ground for exemption:

"The Registrant makes it quite clear that his religious training and belief is not the basis of his present opposition to war.

"There is no doubt that the Registrant is sincerely opposed to war but this belief emanates from personal philosophical conceptions arising out of his nature and temperament, and which is to some extent, political. 133 F. 2d at 707, footnote 2.

"To the extent *Kauten* was denied exemption because he was a fallen-away Catholic rather than orthodox religionist, *Seeger* (also involving a fallen-away Catholic) settled the law that an objective test is to be applied—to wit, the rule the belief plays in the individual's life—rather than a test for doctrinal orthodoxy or regularity in attendance in a particular church of a traditionally pacifist disposition.

"Indeed, the Ninth Circuit in 1954 rejected the error now urged by the government upon this court. In *Shepherd v. United States*, 217 F. 2d 942 (9th Cir. 1954) the registrant was granted exemption from liminary service despite his statement:

"'I am not a pacifist because when God commands me to fight, I will. I will fight to defend my ministry and my brethren, to do the will of my father who is in heaven.' (Matt. 12:50). 217 F. 2d 942 at 944 fn. 2.

"The court followed *Hinkle v. United States*, 216 F. 2d 8 (9th Cir. 1954) holding that belief in self

defense or the righteousness of theocratic wars did not necessarily negative conscientious objection.

"*Taffs v. United States*, 208 F. 2d 329 at 331 (9th Cir. 1954) held:

"Whether a certain war is theocratic or not is a matter of religious belief into which we are forbidden to delve. Appellant's positive and uncontradicted testimony was that he was conscientiously opposed to participation in war because he regarded his duties to Jehovah as being superior to any duties arising out of human relationships. This testimony not being impeached, the test of the statute was met.

"The defendant has standing to attack the construction and constitutionality of the Selective Service Act, because it was applied to deny him exemption accorded other religious conscientious objectors.

"The government's pre-trial memorandum . . . asserts that the mere belief by a registrant that the war in Vietnam is unjust 'does not constitute a sufficient ground upon which to refuse to submit to induction, nor is it a defense to a criminal prosecution for refusal to perform one's military obligation. *United States v. Rehfield*, .... F. 2d .... (9th Cir., September 15, 1969); *United States v. Mitchell*, 369 F. 2d 323 (2nd Cir. 1966), cert. den. 386 U.S. 972 (1967); [other citations omitted]."

"*Rehfield* cites and follows *Mitchell* for the proposition that the illegality of the war in Vietnam even if established affords no defense to refusal of induction, because the power to 'raise and support armies . . . is a matter quite distinct from the use which the

Executive makes of those who have been found qualified and who have been inducted into the Armed Forces.' *United States v. Mitchell*, 323 F. 2d at 324 quoted in *United States v. Rehfield*, (p. 4 of slip opinion).

"The foregoing cases are not in point to the claim of religious conscientious objection by Bowen. The Selective Service Act does not purport to exempt from military service men who think a particular war is illegal, but it does purport to exempt from military service under Section 6(j) men who are opposed by religious belief to participation in war.

"Bowen made it clear that his religious objection extended to military service within the United States as well as anywhere else, upon the obvious ground [to him] that military service in any place would constitute proximate participation in the war by assisting its prosecution or by freeing another soldier to take part therein. Moreover, it appears to be accepted that the courts cannot review the duty assignment of a soldier once he has submitted to induction. *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Noyd v. McNamara*, 267 F. Supp. 701 (Colo.) aff's 378 F. 2d 538 (10th Cir.), cert. denied 389 U.S. 1022 (1967).

"Section 10(b)(3) of the Act expressly provides judicial review [in the criminal prosecution]:

"No judicial review shall be made of the classification or processing of any registrant by local boards . . . except as a defense to a criminal prosecution instituted under Section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, . . . Provided, that such review shall go



to the question of the jurisdiction herein reserved to local boards . . . only where there is no basis in fact for the classification assigned to such registrant.

[See also *Clark v. Gabriel*, 393 U.S. 256 (1968).]

"The Ninth Circuit has long granted review under *Dickinson v. United States*, 346 U.S. 389 (1953).

"*Shepherd v. United States*, 217 F. 2d 942 at 946 (9th Cir. 1954) declared:

We think that a hearing before a Department proceeding upon an erroneous theory as to what constitutes opposition to 'participation in war in any form' is no better than no hearing at all.

"Thus, if the local board proceeded upon an erroneous theory as to what constitutes opposition to 'participation in war in any form', then this court should hold the denial of exemption to Bowen to be without basis in fact.

"For some reason the government brief neglects to cite *United States v. Spiro*, 384 F. 2d 159 (3rd Cir. 1967) cert. denied 390 U.S. 958 (1968) (Justice Black and Justice Douglas are of the opinion that certiorari should be granted).

"*Spiro* held:

Appellant claims that the granting of conscientious objector status to Jehovah Witnesses who will fight only in a theocratic war and the denial of such status to a Catholic who will fight only in a 'just war' violates his federally protected right to religious freedom and to equal protection of the law. Both the Selective Service authorities and the

District Court found that appellant did not meet the statutory test for granting of conscientious objector status. See 50 U.S.C. App. §456(j) (1964). We have authority to reverse only if there has been a denial of basic procedural fairness or if the conclusion of the board is without any basis in fact. *Estep v. United States*, 237 U.S. 114 (1946)....

After thoroughly reviewing the record we can only conclude that appellant's classification did have a factual basis. Once this conclusion is reached, we are without jurisdiction to delve into the legal and theological implications of appellant's beliefs. 384 F. 2d at 160-161.

"*Spiro* would be correct if a basis in fact appeared in the record for finding that *Spiro* was insincere or did not in fact object to serving in the armed forces at the time he was called to submit to induction.

"If *Spiro* is asserted for the proposition that the court is without power to upset application of an erroneous standard by the local board in denying conscientious objector status to a registrant, then *Spiro*, is inconsistent with *Sicurella v. United States*, 348 U.S. 385 (1955) as well as the Ninth Circuit decision in *Shepherd v. United States*, 217 F. 2d 942 (9th Cir. 1954). *Sicurella* and *Shepherd* reversed convictions for refusal of induction because the hearing officer or local board applied an erroneous standard in determining whether the registrant was opposed by reason of religious training and belief 'to participation in war in any form.'

"More basically, it is obvious that it denies due process to incarcerate an individual upon the theory that

an administrative board has a basis in fact for a finding under a test which was either erroneous or unconstitutional. *Cf. United States v. Seeger*, 380 U.S. 163 (1965); *Oestereich v. Selective Service System*, 393 U.S. 233 (1968).

"For the reasons stated Section 6(j) of the Military Selective Service Act of 1967 should be construed to exempt Catholic 'just war' objectors from military service if they are found sincere in their religious objection to participation in any form in the war in which they are called to serve.

"If Section 6(j) is construed to exclude Catholic just war objectors from exemption from military service in a war to which they do object by reason of religious training and belief, because Catholic doctrine admits that other hypothetical wars might later arise in which the Catholic objectors might justly participate, Section 6(j) should be declared unconstitutional as denying equal protection of the law and due process, as well as for establishing religious doctrine and infringing upon the free exercise of religion." "Brief for Defendant After Trial," at 7-20.

The district court in *Bowen* determined that it would have to make a constitutional examination of section 6(j) of the Act because the court was "foreclosed by precedent from . . . a construction of the statute" granting the exemption to selective religious objectors (citing *Kauten v. United States*, 133 F. 2d 703, 708 (2d Cir. 1943) and *Negre v. Larsen* (9th Cir. Nov. 10, 1969).) Slip opinion at p. 4. Citing *Sherbert v. Verner*, 374 U.S. 398 (1963), the court did, however, determine that such a constitutional examination did not require a decision that the "free exercise" clause of the First

Amendment mandated the necessity of the religious conscientious objector exemption. Slip opinion at p. 5 and n. 4. (See also *Speiser v. Randall*, 357 U.S. 513, 518 (1958); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960) and MacGill, *Selective Conscientious Objection: Divine Will & Legislative Grace*, 54 Va. L. Rev. 1355, 1377 n. 89 (1968).) The *Bowen* court then found that section 6(j) specifically discriminated among religious beliefs:

The Government argues further, that because the statute makes no mention of specific religious sects and because it inquires into the subjective beliefs of the individual applicant rather than into the tenets of one's religion, there is no discrimination between religions. Here, again, the Government's contentions are devoid of merit. The constitutionality of a statute is measured more by the results of its application than by its phraseology. [Here the court notes: "If the statute in terms provided that Quakers should be exempt but Catholics should not, there could be no reasonable doubt of its constitutional invalidity. The infirmity is not less if that is the effect of the statute even if the phraseology is not that bald."] Responsible court inquiry must go beyond the words to the practical effects. *Terry v. Adams*, 345 U.S. 461 (1953). Constitutional infirmities may not be covered up or overcome by apparently innocuous statutory language. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) . . . *Epperson v. Arkansas*, 393 U.S. 97 (1968) . . . Nor is it permissible to discriminate invidiously by employing as statutory standards individual traits which effectively distinguish one group from an-

other. *Guinn v. United States*, 238 U.S. 347 (1915); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967). . . .

An examination of the practical effects of § 6(j), based on judicial notice, the *amicus* briefs, and the extensive testimony in this case, leads necessarily to the conclusion that members of traditionally pacifist religions—such as Quakers and Jehovah's Witnesses—are generally exempted from military service while members of other religions—such as Bowen's Roman Catholic faith—are not so exempted. *United States v. Bowen*, *supra*, slip opinion at pp. 5 and 6.

In addition to this decision based upon the "establishment" clause the court believed that "Section 6(j) must also fall before the constitutional prohibition against denial of equal protection of the laws." Slip opinion at p. 7.

The court found that mere selectivity is an impermissible classification, violative of equal protection and due process.

Normally, courts require only that a statute employ a classification which is reasonable in the light of the purposes of the Act. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), this test was held not to be controlling. There the court held unconstitutional a requirement that to be eligible for welfare, persons must have lived within the jurisdiction for one year. The Court noted that the residency requirement discouraged travel and concluded that where so fundamental a right as the right to travel is infringed, "any classification which serves to penal-



ize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." 394 U.S. at 634 (emphasis in original). See also *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (the court indicated that it would examine with "strict scrutiny" legislation which infringed on a right as important as that of procreation). In other cases it may be difficult to determine whether the right involved should be considered fundamental, but no rights are more fundamental than those of the First Amendment here involved. So, applying the *Shapiro v. Thompson* test, it is clear that there is no compelling governmental interest for distinguishing the defendant, who is opposed to participation in the Vietnam war on religious grounds, from others who are religiously opposed to all wars. Slip opinion at pp. 8-9.

While the Constitution may impel, by reason of the "free exercise" clause, exemption to both religious non-selective objectors and religious selective objectors, that issue need not be decided here. But to determine that the judgment below be affirmed, *amicus* argues that this Court should determine that *Bowen* is correctly decided; *viz.*, that Congress by exempting religious non-selective conscientious objectors must, in order not to establish privileges for certain religions or to discriminate among them, also allow a selective religious conscientious objector exemption; and that any contrary judicial interpretation of section 6(j) is incorrect.

This Court may make such a determination by an interpretation of the existing statutory language, which does not in itself *exclude* selectivity. The statute grants

exemption to those who are "conscientiously opposed to participation in war in any form." If the phrase "in any form", as limited by *Sicurella* to mean only, in the language of the decision, shooting wars between nations on earth, then the phrase "participation in war" may also be deemed limited to the particular war being waged rather than "all wars". See also the *Bowen* court's attempt to avoid the constitutional issue by statutory construction in slip opinion at pp. 3-4.

**C. It Is an "Establishment" of Religion to Disallow the Section 6(j) Exemption to an "Atheist."**

The third category, that of non-religious, non-selective contentious objection, presents the case of the "atheist" (if that term is viable after *United States v. Seeger*, 380 U.S. 163 (1965)) who is non-selectively opposed to war. (That is, who meets the "opposition to all wars" element denominated in *United States v. Kauten*, 133 F. 2d 703, 708 (2d Cir. 1943).)

Here *amicus* argues that the "establishment" clause of the First Amendment requires that non-religious, non-selective objectors also be given the exemption granted to religious, non-selective objectors. *Amicus*, while agreeing with the result, finds the statutory interpretation in *United States v. Schacter*, 1 S.S.L.R. 3272 (D. Md. 1968), allowing exemption to an atheist who

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<sup>9</sup>This issue will be given plenary consideration in *Welsh v. United States*, No. 76, this Term, slated for argument with *Sisson*. Argument on this issue is included at this point to indicate the necessity of reaching the issue in this case.

had by reason of previous religious training and belief adopted his objection to war, unsound. This is because the constitutional issues the interpretation attempts to avoid are merely shifted into another context.<sup>10</sup>

<sup>10</sup>In *United States v. Schacter*, the court determined that the phrase "by reason of religious training and belief" did not require that the objector *currently* hold the religious belief derived from prior religious training and belief to be eligible for the exemption. The court felt impelled, by reason of the *Seeger* rationale, to "save" the statute which it would otherwise have had to declare unconstitutional, presumably as an "establishment of religion." The special facts in *Schacter*, including the registrant's long and traditional training in the orthodoxy of his former faith (Judaism), therefore established "religious training and belief." In and of itself, this interpretation would still render section 6(j) of the Act unconstitutional for it compels the objector to espouse a religious belief and requires objectors who wish exemption to seek "religious training" prior to determining if they are conscientiously opposed to participation in war. This the Government may not do, either directly or indirectly. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *School District of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Torcaso v. Watkins*, 367 U.S. 488 (1961); Conklin, *Conscientious Objector Provisions: A View in Light of Torcaso v. Watkins*, 51 Geo. L.J. 252 (1963).

The court also felt impelled to examine the inartful language of the section which attempted to define a "religious belief," and attempted to distinguish such beliefs from a "merely personal moral code" which the statute declares is not a religious belief. The court determined that any belief externally derived was not a "merely personal moral code." Yet *all* beliefs are externally derived. Every moral imperative is based upon normative presumptions which create values and allow individuals to deduce moral codes therefrom. (The "merely personal" language must thus mean "unique" and thus distinguishes among traditional, reasonable and unusual religions. This is impermissible, *Ballard v. United States*, 322 U.S. 78 (1944), and seems, in addition to "establishing" religion, to violate the equal protection and due process clauses of the Constitution.) As John Donne said in another context, "No man is an island unto himself." It has been a cornerstone of western psychology, unquestioned by even the most radical and "objective" philosophers such as Ayn Rand, that every man's beliefs are derivative from some greater collective normative impulse. See, e.g., S. Freud, *Totem and Taboo* (1952, J. Starchey translation).

Section 6(j) of the Act must be found unconstitutional unless those references to "religious training and belief" are stricken so that the following remains:

Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who . . . is conscientiously opposed to participation in war in any form . . .

To hold otherwise leaves intact a statute which violates the "establishment" clause of the First Amendment.

While it is true that all courts which, prior to the *Bowen* case, have considered the constitutional question, have held the statute not to violate the "establishment" clause of the First Amendment, *amicus* argues that in light of this Court's most recent interpretations of that clause, the Constitution now requires an opposite result.

The only case in which this Court was confronted with the issue was *Arver v. United States*, 245 U.S. 366 (1918). In upholding the validity of the compulsory military service laws, this Court stated,

And we pass without anything but the statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we are at the outset referred, because we think its unsoundness is too apparent to require us to do more. 245 U.S. at 389-90.

(At the time *Arver* was decided Congress exempted "from military service in the strict sense the members

of religious sects as enumerated whose tenets excluded the moral right to engage in war," although such persons were required to perform non-combatant services. 245 U.S. at 376.)

Various attacks on the statute since 1918 all have been as summarily dismissed. Language in *George v. United States*, 196 F. 2d 445, 450-452 (9th Cir.), *cert. denied*, 344 U.S. 843 (1952), is often relied on:

In sum, as the exemption from participation in war on the ground of religious training and belief can be granted or withheld by the Congress, the Congress is free to determine the persons whose opinions the Congress does not class as religion in the ordinary acceptance of the war. So, assuming that the definition of "religious training and belief" in Section [6(j)] is restrictive, such restriction is within the constitutional power of the Congress.

Relying on this statement, the Ninth Circuit has held the religious exemption constitutional in *Etcheverry v. United States*, 320 F. 2d 873, 874 (9th Cir.), *cert. denied* 375 U.S. 930 (1963), *rehear. denied* 375 U.S. 989, 376 U.S. 939 (1964), 380 U.S. 926 (1965) and *Clark v. United States*, 236 F. 2d 13, 23-24 (9th Cir.) *cert. denied* 352 U.S. 882, *rehear. denied* 352 U.S. 937 (1956). There is, however, an important difference in the present case. *Amicus* does not urge that the grant of exemption to only religious objectors be held unconstitutional because (without having to decide if a conflict exists between the "establishment" and "free exercise" clauses *inter se*), less onerous alternative is available: to allow exemption to non-religious objectors. Since 1947 a number of this Court's cases inter-



preting the "establishment" clause call for a reconsideration of the *Arver* decision.

None of the Supreme Court decisions dealt with the constitutionality of the "religious training and belief" provision of section 6(j) of the Act now in question. But, to say the least, the rationale of these other decisions provides fodder for a strong argument that the "religious training and belief" provision of section 6(j) cannot withstand a constitutional challenge." Hamley, Circuit Judge, dissenting in *Welsh v. United States*, (9th Cir. September 23, 1968) at 15-16.

Judge Hamley argues that the Court should have considered the "establishment" clause violation question; and that by avoiding it "the result reached by the majority represents a negative answer to the constitutional question, but the majority has not said why." *Id.* at 22.

The first in the series of cases most recently explicating the parameters of the "establishment" clause was *Everson v. Board of Educ.*, 330 U.S. 1 (1947). (In the *Everson* case, a New Jersey statute authorized local boards of education to make rules and contracts for the transportation of children to and from schools other than private schools operated for profit. Pursuant to this statute, a local board authorized the reimbursement to parents for fares paid for the transportation by public carrier of children attending public and Catholic parochial schools. The latter gave, in addition to secular education, religious instruction in the Catholic faith.)

Mr. Justice Black, speaking for the majority, stated that "[w]hether this New Jersey law is one respecting

an 'establishment of religion' requires an understanding of the meaning of that language. . . ." 330 U.S. at 8. Mr. Justice Black then extensively reviewed the background and environment of the period during which the "establishment" clause was fashioned.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches . . . . Among the offenses for which . . . punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them. These practices of the old world were transplanted and began to thrive in the soil of the new America . . . . These practices became so commonplace as to shock the freedom loving colonials into a feeling of abhorrence . . . . It was these feelings which found expression in the First Amendment . . . . The people . . . reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group. 330 U.S. at 8-11.

Pointing out that the Supreme Court had given broad meaning to the "free exercise" clause, Mr. Justice Black stated that "[t]here is every reason to give the same application and broad interpretation to the 'establish-

ment of religion clause.' " 330 U.S. at 15. He then concluded with the following sweeping language:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 330 U.S. at 15-16.

The opinion also discussed the state's provision of general government services such as ordinary police and fire protection to parochial schools. Such "serve much the same purpose and accomplish much the same result" as the transportation statute at issue here. 330 U.S. 17. Withdrawal of such services would make it more difficult for the schools to operate.

But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a *neutral in its relations with groups of religious believers and non-believers*; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them . . . . The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools. 330 U.S. at 18. [Emphasis added.]

The opinion ends,

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. 330 U.S. at 18.

In *McCollum v. Board of Educ.*, 333 U.S. 203 (1948) this Court approved *Everson* and explicitly rejected Illinois' arguments that government neutrality was to be between religious and non-religious beliefs:

... Recognizing that the Illinois program is barred by the First and Fourteenth Amendments if we adhere to the views expressed both by the majority and by the minority in the *Everson* case, counsel for the respondents challenge these views as dicta and urge that we reconsider and repudiate them. They argue that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religious. . . . [W]e are unable to accept . . . [this contention]. 333 U.S. at 211.

To the same effect on this point is *Torcaso v. Watkins*, 367 U.S. 488 (1961):

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers . . . 367 U.S. at 495.

The *Torcaso* opinion also expressly approved of the broad *Everson* "establishment" clause language. 367 U.S. at 492-93.

In *Engel v. Vitale*, 370 U.S. 42 (1962) the practice of prayer reading in school was held to be "wholly inconsistent" with the "establishment" clause. 370 U.S. at 421. The defect involved in the *Engel* case was that the state itself promulgated religious doctrines in the schools.

When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes of the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. . . . Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious prosecutions go hand in hand. 370 U.S. 431-32.

*School District of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) provides the concrete test by which the Military Selective Service Act's discrimination between religious and non-religious objectors must fall. In the *Schempp* case (involving voluntary attendance at Bible reading in schools), this Court expressly reaffirmed the neutrality doctrine of *Everson*, 374 U.S. at 216, 218, reviewed earlier Supreme Court cases which had considered the "establishment" clause, and then proceeded to fashion the following test:

The test may be stated as follows: what are the purpose and the primary effect of the enactment: If either is the advancement of religion then the



enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of non-religious belief, to the "establishment" clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. 374 U.S. at 222.

It is obvious that Section 6(j) of the Act favors "all believers over all non-believers" who are opposed to war, and that the conscientious objector provision is primarily *not* secular in purpose or primary effect. The purpose of section 6(j) is to permit registrants who profess certain religious beliefs to fulfill their military obligations in a manner which is consistent with their beliefs. By doing so, the primary effect of this Governmental action is to sanction and respect certain beliefs over others, merely because the former are religious and not secular.

There is, *in ultimo*, only one basis of distinction between religious believers and religious non-believers. But for the Government to condition receipt of either a right or privilege upon that distinction (religiousness, *vel non*) clearly crosses the wall the "establishment" clause of the Constitution has erected.

**D. It Is Unconstitutional to Deny a Selective, Non-Religious Conscientious Objector an Exemption by Analogy to the Preceding Arguments.**

If this Court accepts the argument that it is unconstitutional to discriminate between selective and non-selective religious objectors, and unconstitutional to allow the grant of the exemption only to religious and

not non-religious objectors, the Court must now decide the issue at bar in the present case: Is Section 6(j), by denying exemption to a non-religious, selective objector, unconstitutional? *Amicus* argues that if the former two arguments are viable, the inevitable conclusion must be in the affirmative.

The "establishment" clause position set forth in part C of Argument compels this Court to allow the grant of exemption to any conscientious objector regardless of whether his belief is religious or not as long as the belief is sincerely held. A modified, secularized *Seeger* test might be applied here to require the non-religious belief to "occupy the same place in the life of the objector as a religious belief."

The "equal protection," "due process" and "establishment" clause positions set forth in part B of Argument require the grant of exemption to any religious objector whose belief requires him to refuse to participate in the particular war for which he might be drafted, although he may, under some hypothetical circumstances, not be opposed to *all* wars. Again, the exemption to a religious selective objector must extend to his non-religious counterpart to avoid "establishing" religious belief. Thus, if Section 6(j) precludes the grant of an exemption to a selective, non-religious objector such as *Sisson* it is constitutionally infirm.

A test, such as that in *Bowen*, might be required to determine if the selective religious objector's belief is reasonable in light of the totality of his belief. Extending the modified *Seeger* test, *supra*, the same test may also be applied to non-religious selective objectors, utilizing the *Bowen* rationale which seems to view the selectivity issue as an integral element of an objector's beliefs and relying on sincerity and reasonableness alone.

*Ballard v. United States*, 322 U.S. 78 (1944) may be read to preclude even the reasonableness test in *Bowen*. "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." 322 U.S. at 86. However, at least one commentator has argued, that *Ballard* has been modified in its effect: "*Seeger* appears to modify the effect of [*Ballard*] at least where Section [6(j)] is concerned. To *Ballard's* holding that the truth or falsity of religious views is not a matter into which a Court can inquire, *Seeger* adds the gloss that in the context of conscientious objection there may be some views which, however true they may be and no matter how sincerely held, cannot compel recognition as 'religious.'" McGill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 Va. L. Rev. 1355, 1368-69 n. 57 (1968). It should be added that this need have no effect here if the "establishment" clause argument de-vitalizes the "religious" test which *Seeger* may otherwise require, and that *Seeger* still serves the useful and important purpose of determining whether the belief is sincerely and reasonably held and whether it is of such nature as to be respected by grant of exemption.

### Conclusion.

*Amicus* respectfully prays that in its decision in the present case, this Court should reach the issue of whether a non-religious selective objector may be constitutionally denied an exemption granted to his religious believing counterpart. *Amicus* urges this Court to affirm the arrest of judgment of respondent Sisson and declare those portions of Section 6(j) of the military Selective Service Act of 1967 which refer to "religious training and belief" unconstitutional, and to over-

rule the judicial interpretations of the phrase "participation in war in any form" which preclude selective objection.

Furthermore, it should be noted that while the ruling prayed for by *Amicus* may increase considerably the number of registrants entitled to conscientious objector's status (a classification of I-O under 32 C.F.R. §1622.14 (1969)) it will not relieve them from duty in alternate civilian service in the national interest as provided by 32 C.F.R. pt. 1660 (1969) which has been historically required of all conscientious objectors. Each conscientious objector will be required to perform at least two years of alternate civilian service which serves the national interest, and must be called in the same order of call and subject to the same rules of priority and qualification as any other inductee holding the availability classification of either I-A (32 C.F.R. 1622.10 (1969) or I-A-O (32 C.F.R. 1622.11 (1969)). See *Local Board Memorandum No. 64* (reprinted at 1 S.S.L.R. 2183 (1969)).

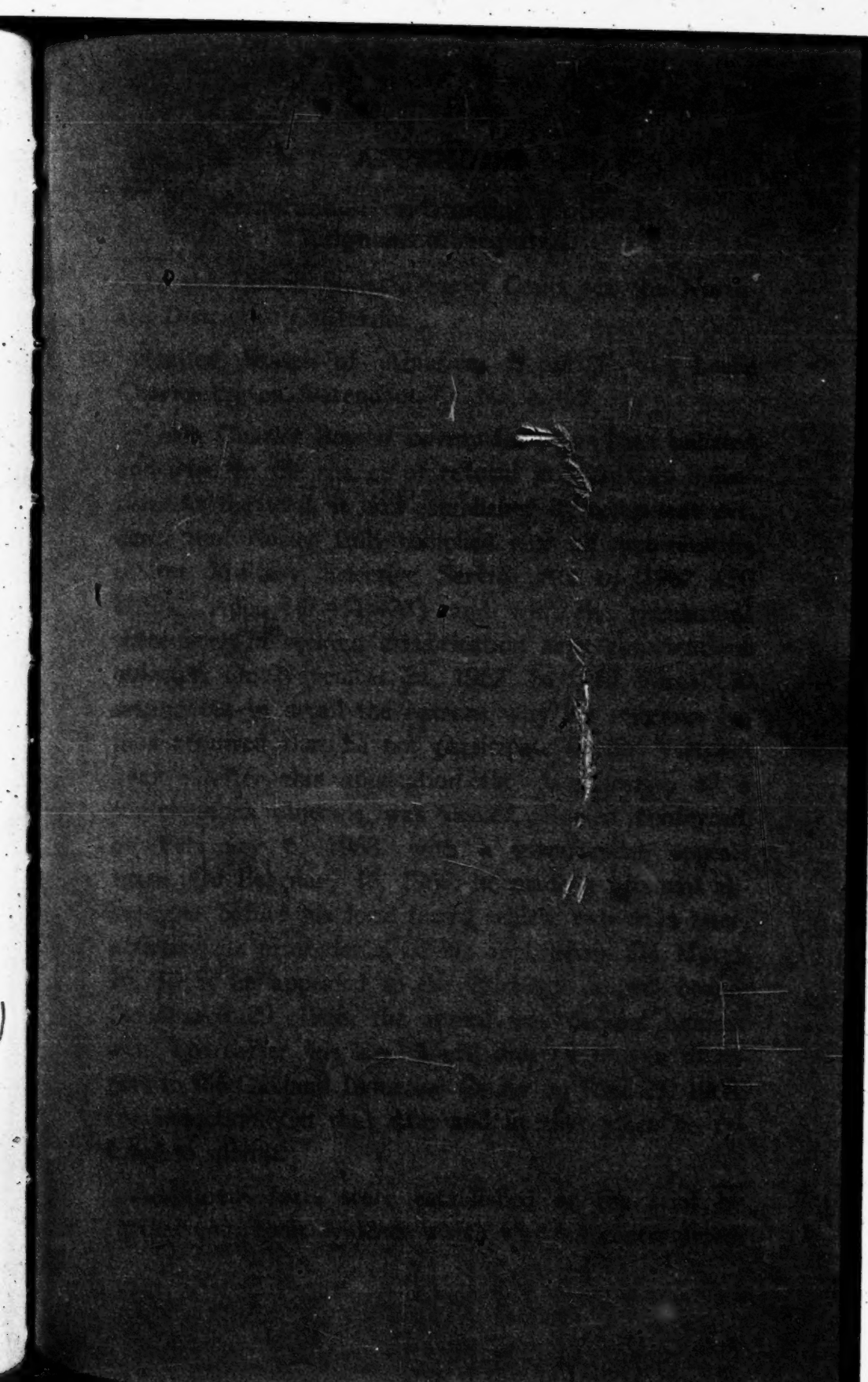
Respectfully submitted,\*

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\*Counsel gratefully acknowledge the legal research and drafting assistance of Scott J. Tepper, a law student at Harvard University, and a member of the Committee for Legal Research on the Draft of the Harvard Law School.







## APPENDIX.

### Memorandum on Granting Motion for Judgment of Acquittal.

In the United States District Court for the Northern District of California.

United States of America, Plaintiff, vs. Leslie Charles Bowen, Defendant. Cr. No. 42499.

Leslie Charles Bowen, twenty-four, has been indicted and tried on the charge of refusal to submit to induction. At the trial, it was established by competent evidence that Bowen fully complied with all requirements of the Military Selective Service Act of 1967 (50 U.S.C. App. §§ 451-473) and with the regulations thereunder in seeking classification as a conscientious objector. On November 21, 1967, he filed Form 150 setting out in detail the reasons why his religious beliefs required that he not participate in the Vietnam War. After this application for classification as a conscientious objector was denied, Bowen conferred, on February 6, 1968, with a government appeals agent. On February 16, 1968, he made a personal appearance before his local board which, two days later, affirmed its prior denial of his application. On March 16, 1968, he appealed to the Michigan appeal board. On March 29, 1968, the appeal was decided against him. Thereafter, his local board ordered Bowen to report to the Oakland Induction Center on June 23, 1968, for induction. On that date and at that place he refused to submit.

Additional facts were established at the trial by further competent evidence which was not contradicted.

Defendant Bowen is by training and belief a Roman Catholic. He was baptized a Catholic as an infant. He attended Catholic parochial schools for most of his formal education. He has remained a practicing Catholic throughout his life.)

According to Catholic doctrine, as Bowen understands it, there are just and unjust wars.<sup>1</sup> This Catholic doctrine, to which Bowen sincerely deems himself

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<sup>1</sup>It is not for the courts to explore into what is or is not doctrinal orthodoxy. A salutary incident of the separation of church and state is the corollary that Congress and the courts do not involve themselves in theological disputes—a task for which they are ill-suited. In questions of conscientious objection, the courts' role, as defined by the Supreme Court, "is to decide whether the beliefs professed by a registrant are sincerely held, and whether they are in his own scheme of things, religious." *United States v. Seeger*, 380 U.S. 163, 184-5 (1965). Without presuming, then, to make a conclusive statement about what is orthodox Catholic doctrine, this Court concludes from the ample testimonial and doctrinal evidence introduced at trial that at least a substantial number of knowledgeable Catholic leaders count the doctrine of just wars as a basic element of church dogma, that Bowen reasonably believed Catholic doctrine to require that he make his own determination as to whether the war was or was not just and, that having decided it was unjust, conscientiously believed his religious faith made it imperative that he refuse to serve. This conclusion is based on: (1) the uncontroverted testimony of defendant, at Aquinas College, and of the Reverend James E. Straukamp, an ordained Catholic priest; (2) stipulations of counsel as to the testimony of witnesses; (3) documents produced by the Reverend Peter J. Riga, Professor of Theology at St. Mary's College, the Reverend William J. O'Donnell, Assistant Pastor, St. Joachim's Church, Hayward, California and the Reverend Terence O'Shaughnessy, O.P., Chairman, Theology Department, Aquinas College; and (4) the introduction into evidence of excerpts from the Second Vatican Council's *Pastoral Constitution in the Modern World* (especially note 79), of a collective pastoral letter of the American Hierarchy, *Human Life in Our Day*, November 15, 1968 and of the Encyclical of Pope John XXIII, *Pacem in Terris*.

While not of direct pertinence, it is to be noted that *amicus curiae* briefs were brought to the Court's attention which documented the view that communicants of other faiths—Protestant and Jewish—have ample doctrine in their religions to support similar religious conscientious objection.

bound by his religion, sets out certain standards according to which each Catholic is to determine for himself whether a war is just. If he determines it is unjust, a Catholic must not participate in it. To do so would be to violate his religion. After instruction and study in this doctrine, Bowen concluded that it would violate his religion and his conscience to participate in the Vietnam War.

There is no question about the defendant's religious motivation nor his sincerity in refusing, as a matter of religious belief, to submit to induction. Both were fully established at the trial.

The only questions are whether, under Section 6(j) of the Military Selective Service Act of 1967, Bowen should have been granted conscientious objector status and, if not, whether the Section is constitutional.

Section 6(j) provides that exemption from "combatant training and service in the Armed Forces" shall be granted to any person "who by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Defendant, urging that he should have been granted conscientious objector status, contends that since the statutory language is not explicit in requiring objection to all wars, constitutional doubt should be avoided by construing the Section to include objectors to particular wars. The argument is that the language should be given a practical interpretation; that the only meaningful question for each registrant is whether his religious beliefs allow him to participate in the war to which he will have to contribute if inducted; and that to inquire into a person's possible stance on any hypo-



thetical future war is to indulge in speculation on a question of critical importance to the individual.

The argument has some persuasive strength but this Court is foreclosed by precedent from such a construction of the statute. The interpretation that Section 6(j) requires opposition to all wars appears to be too well-established to be open to challenge here. *Kauten v. United States*, 133 F.2d 703, 708 (2d Cir. 1943); *Negre v. Larsen*, Cr. No. 24067 (9th Cir. November 10, 1969).<sup>2</sup>

The Military Selective Service Act of 1967, then, distinguishes between persons who object to all wars on the basis of religious training and belief and those who object on that basis to some one or more wars, but not all. The constitutional validity of this distinction is therefore brought into question in this case. It is brought into question in two respects. First, does the distinction violate the command of the First Amendment against "any law respecting an establishment of religion"? Second, does that distinction amount to such serious and unjustifiable discrimination as to make it a violation of the due process clause of the Fifth Amendment? See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

The United States argues that no substantial constitutional issues are raised by this case.

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<sup>2</sup>*Negre v. Larsen* involved an in-service objector to the Vietnam War. In a per curiam decision, the Ninth Circuit ruled that *Negre* should not be discharged from the service because (1) he did not object to "war in any form" and (2) because his views were not based on religious training and belief. In the present case, the fact that Bowen's views are based on religious training and belief forces the Court to consider the constitutional questions.



Quoting from *Cannon v. United States*, 181 F.2d 354 (9th Cir. 1950), the Government makes the argument that since all persons may be called to service, exemption is a matter of grace and not subject to any constitutional limitations. However, since *Cannon*, the Supreme Court has held that, although Congress may take certain privileges or benefits away altogether, it may not arbitrarily and unreasonably grant such privileges to some and not to others. *Sherbert v. Verner*, 374 U.S. 398 (1963). See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968). Thus, in this case, any exemption granted by Congress is subject to the limits of the Constitution.<sup>4</sup>

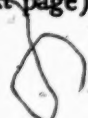
The Government argues further, that because the statute makes no mention of specific religious sects and because it inquires into the subjective beliefs of the individual applicant rather than into the tenets of one's religion, there is no discrimination between religions. Here, again, the Government's contentions are devoid of merit. The constitutionality of a statute is measured more by the results of its application than by its phraseology.<sup>5</sup> Responsible court inquiry must go beyond the

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<sup>4</sup>"We find it unnecessary to determine whether an exemption for some or all conscientious objectors is a constitutional necessity, or is merely dependent upon the will of Congress. . . . For it now seems well-established that legislative power to deny a particular privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional conditions. See *Speiser v. Randall*, 357 U.S. 513 (1958). It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination." *United States v. Seeger*, 326 F.2d 846, 851 (1964). See also *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>5</sup>If the statute in terms provided that Quakers should be exempt but Catholics should not, there could be no reasonable doubt of its

(This footnote is continued on the next page)



words to the practical effects. *Terry v. Adams*, 345 U.S. 461 (1953). Constitutional infirmities may not be covered up or overcome by apparently innocuous statutory language. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (statute applying to wooden laundries found to discriminate against Chinese citizens); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (law prohibiting the teaching in public schools of the doctrine of evolution found to discriminate in favor of fundamentalist Protestant religions, even though no mention made of any religion.) Nor it is permissible to discriminate invidiously by employing as statutory standards individual traits which effectively distinguish one group from another. *Guinn v. United States*, 238 U.S. 347 (1915) (grandfather clauses); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967) (de facto school segregation; tracking system has adverse effect on disadvantaged minorities).

An examination of the practical effects of Section 6(j), based on judicial notice, the *amicus* briefs, and the extensive testimony in this case, leads necessarily to the conclusion that members of traditionally pacifist religions—such as Quakers and Jehovah's Witnesses—are generally exempted from military service while members of other religions—such as Bowen's Roman Catholic faith—are not so exempted.

The First Amendment to the Constitution states: "Congress shall make no law respecting an establish-

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constitutional invalidity. The infirmity is no less if that is the effect of the statute even if the phraseology is not that bald.

ment of religion . . .” The Supreme Court has recently declared the meaning of this central principle of separation of church and state as follows:

Government in our democracy, state and national, must be *neutral in matters of religious theory, doctrine, and practice*. It may not be hostile to any religion or to the advocacy of no religion; and *it may not aid, foster, or promote one religion or religious theory against another* or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion and between religion and nonreligion. *Epperson v. Arkansas*, 393 U.S. 97, 103-4 (1968) (emphasis added).

In denying conscientious objector status to Bowen based upon his religious opposition to the Vietnam War but permitting it to one whose religious opposition is to all wars, the effect of Section 6(j) is to breach the neutrality between religion and religion required by the mandate of the First Amendment.

Section 6(j) must also fall before the constitutional prohibition against denial of equal protection of the laws. As has been seen, the Section permits exemption to religious “absolute” objectors but denies it to religious “selective” objectors. In this, it denies equal protection and, therefore, due process under the doctrine of *Bolling v. Sharpe*, *supra*.

This violation of the Fifth Amendment is, of course, bottomed on substantially the same defects in Section 6(j) as those which make it violative of the First Amendment. Because the First Amendment specifically applies to religion whereas the equal protection clause has a much broader sweep, discrimination between dif-

ferent religious doctrines has generally been considered in connection with the establishment clause of the First Amendment. However, a recent Supreme Court decision, based on equal protection, seems particularly applicable here. Normally, courts require only that a statute employ a classification which is reasonable in the light of the purposes of the Act. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), this test was held not to be controlling. There the Court held unconstitutional a requirement that to be eligible for welfare, persons must have lived within the jurisdiction for one year. The Court noted that the residency requirement discouraged travel and concluded that where so fundamental a right as the right to travel is infringed, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." 394 U.S. at 634 (emphasis in original). See also *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (the Court indicated that it would examine with "strict scrutiny" legislation which infringed on a right as important as that of procreation). In other cases it may be difficult to determine whether the right involved should be considered fundamental, but no rights are more fundamental than those of the First Amendment here involved. So, applying the *Shapiro v. Thompson* test, it is clear that there is no compelling governmental interest for distinguishing the defendant, who is opposed to participation in the Vietnam War on religious grounds, from others who are religiously opposed to all wars.\*

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\*It is recognized that Section 6(j) may serve administrative efficiency by limiting the class of persons eligible for conscientious objector status. However, it is doubtful that the sincerity

Having concluded that the classification established by Section 6(j) is unconstitutional, it is unnecessary to reach the much broader argument that the Section also violates the First Amendment's command against any law prohibiting the free exercise of religion.

The motion for judgment of acquittal is granted.

Dated: December 24, 1969.

/s/ STANLEY R. WEIGEL  
Judge

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of religious objectors to all wars can be more reliably determined than the sincerity of religious objectors like Bowen. In any case, administrative convenience is not a sufficiently compelling consideration to justify disregard of the First and Fifth Amendments.





In the Supreme Court of the  
United States

OCTOBER TERM, 1969

No. 305

UNITED STATES OF AMERICA,  
*Appellant,*  
vs.  
JOHN HETTRON SIBSON, JR.

On Appeal from the United States District Court  
for the District of Massachusetts

BRIEF OF  
LAWYERS' SELECTIVE SERVICE PANEL OF SAN FRANCISCO,  
AS AMICUS CURIAE

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# In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1969

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No. 305  
—

UNITED STATES OF AMERICA,

VS.

*Appellant,*

JOHN HEFFRON SISSON, JR.

On Appeal from the United States District Court  
for the District of Massachusetts

BRIEF OF

LAWYERS' SELECTIVE SERVICE PANEL OF SAN FRANCISCO,  
AS AMICUS CURIAE

—  
Pursuant to the provisions of Rule 42, the Lawyers' Selective Service Panel of San Francisco has obtained written consents from all parties to file this brief as *amicus curiae*. The original letters of consent have heretofore been filed with the Clerk (Stern and Gressman, SUPREME COURT PRACTICE 4th Edition, 1969, p. 320, n. 85).

The Panel consists of a group of almost two hundred lawyers who have, under appointment by the judges of the Northern District of California, pursuant to the Criminal Justice Act of 1964, 18 U.S.C.A. 3006A, represented in the past two years upwards of several hundred young men of conscience who have been prosecuted because of their refusals to be conscripted.

While these refusals have been based on a variety of factors and while it is not always easy for their lawyers to isolate out those principally responsible for their clients' resistance to conscription, it seems fair to say that, out of their experience with these many objectors, the lawyers of the Panel have been impressed by the fact that one of the strong motivations for their client's risk of jail rather than conscription has been the belief that the war in Vietnam (which is the chief, if not the sole, occasion for their conscription) fails to command the support of the people of this country. One of the principal manifestations of this lack of support has been the fact that the elected representatives of the American people have not exercised their constitutional power to declare war on the Vietnamese people.<sup>1</sup>

Another factor which appears to us to have strongly influenced our clients' resistance to conscription is the belief that, as the history of the Vietnam

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<sup>1</sup>Our clients, then, comprise a portion of that group who, according to Mr. Justice Douglas, "are being marched off to jail for maintaining that a declaration of war is essential for conscription ['in the conflict in Vietnam']." (*Holmes v. United States*, 391 U.S. 936, 949 [1968]).

conflict has unfolded before the eyes of a horrified world, it has been carried on in violation of the law of nations and contrary to the treaty obligations of the United States.

Under these circumstances, our clients have maintained that, as citizens of a constitutional republic, they may not be conscripted against their will to participate in such a war.

In this brief we shall attempt to establish that this Court has never said that a conscription statute can be constitutionally applied to those young men of this nation who refuse to participate in such a war, and to the extent that Judge Wysanski's decision recognizes that when so applied conscription is unconstitutional, it is solidly grounded and should be affirmed.<sup>2</sup>

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<sup>2</sup>We recognize that both the Government's Jurisdictional Statement and its Brief seek the reversal of the judgment below on other and different grounds and that they make only passing reference (see Brief, p. 52, n. 17) to the questions here adjudicated. But if the judgment below is sustainable on any ground, whether or not asserted by the District Court, it will be affirmed here (*Ryerson v. United States*, 312 U.S. 405 [1941]; *Oklahoma v. United States Court Service Commissioner*, 330 U.S. 127 [1947]; *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464 [1947]).

THE GOVERNMENT OF THE UNITED STATES MAY NOT, SO LONG AS THE CONSTITUTION OF THE UNITED STATES REMAINS IN EFFECT, CONSCRIPT AMERICAN CITIZENS TO FIGHT IN AN UNDECLARED OVERSEAS WAR CONDUCTED IN VIOLATION OF THE LAW OF NATIONS AND OF THE TREATY OBLIGATIONS OF THE UNITED STATES.

(A) The questions are important and require decision now.

We here postulate four factors: (1) the government is conscripting to fill manpower needs created by the Vietnam war; (2) the war is undeclared; (3) it is an overseas war, not the suppression of an insurrection or the repulse of an invasion (compare United States Constitution, Article I, Section 8, Clause 15); (4) it is being conducted in violation of the law of nations and the treaty obligations of the United States.

We submit that if *any one* of the foregoing four postulates is true, then the government has no constitutional power to conscript men for service. If *all* of them (or any lesser number) are true, then so much the stronger is the constitutional case of our clients against conscription.

We take it that there is no dispute that the war is undeclared and that it does not involve an internal insurrection or an invasion. With respect to the other two factors: that conscription is principally to fill manpower needs in Viet Nam and that the war is being conducted in violation of international law and the United States' obligation thereunder, we call attention not only to the evidence given in this case by Professor Falk, but also to the widespread public notice which has attended these matters.

In *Morse v. Boswell*, 393 U.S. 802, 806 (1969), for example, Mr. Justice Douglas cited the legislative history of Pub. L. 89-687, Title I, October 15, 1966, 80 Stat. 981. This makes it clear that the Congress has understood the purpose and result of conscription since 1966 at least to be the procurement of manpower for the Viet Nam conflict.

Thus, Senator Lausche at 112 Cong. Rec. 19724 (1966) related conscription to "active military service in South Viet Nam"; Senator Symington, a member of the Armed Services Committee, said, "... we are daily inducting large numbers of men into the active forces to fight in Viet Nam" (112 Cong. Rec. 19720 [1966]); and Senator Saltonstall, the ranking minority member of the same Committee, spoke of "... service in Viet Nam ... [by] new enlistees and draftees" (112 Cong. Rec. 19500 [1966]; italics supplied).

Earlier Mr. Justice Douglas had noted that it was in July of 1965 that the President announced an increase in the number of American troops to be sent to Viet Nam and a concurrent increase in draft calls. It was then that "the Nation as a whole for the first time probably realized that *the Southeast Asian conflict would result in an extensive peacetime draft at home*". (*Hart v. United States*, 391 U.S. 956, 959 [1968]; italics supplied).

At the close of the last term, Chief Justice Warren and Mr. Justice Marshall joined Mr. Justice Douglas in explicating that "registrants [are] being sent to Viet Nam" and made specific reference to the regis-



trants' "Viet Nam burden". (*Sellers v. Laird*, 395 U.S. 950, 954-955 [1969]). None of the other members of the Court suggested that these observations were not accurate reflections of the facts.

This Court has not refused to recognize facts so well known to all the world.

"All others can see and understand this. How can we properly shut our minds to it?" (Chief Justice Taft in the *Child Labor Tax Case*, 259 U.S. 20, 37 [1922]).

"And there comes a point where this Court should not be ignorant as judges of what we know as men." (Justice Frankfurter in *Watts v. Indiana*, 338 U.S. 49, 52 [1949]).

(1) Under our system of government, it is only Congress, "the great representative body of the people" (*Selective Draft Law Cases*, 245 U.S. 366, 390 [1918]), that has the power to declare war (United States Constitution, Article I, Section 8, Clause 11).

When the elected representatives of the people make a solemn declaration of war, with concomitant obligations thereby placed upon all of the citizenry, it may be conceded that Congress has the constitutional power to conscript, even for overseas military service—but that is not this case. This case questions Congress' power to conscript for overseas military service in a time of peace. And by "peace" can only be meant that state of affairs which exists absent the only constitutionally valid exercise of the power to create a state of war—i.e., the exercise by Congress of its war-declaring power. Whether the Executive may consti-

tutionally use *volunteers* to engage in overseas military action, "short of war," is not in this case either. Here, it is in reliance upon an act of Congress that the Executive, while this nation is still "at peace" in the constitutional sense, *conscripts* young Americans for the Vietnamese war or sends them to jail.<sup>3</sup>

(2) This Court has never said, nor have any of its predecessors, that peacetime conscription, for either overseas or home use is constitutionally permissible. The *Selective Draft Law Cases* obviously did not deal with this problem. To the contrary, the explicit basis for the holding that Congress had the power to conscript was the fact that Congress had already exercised its power to declare war:

"Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation *as the result of a war declared by the great representative body of the people* can be said to be the imposition of involuntary servitude, in violation of the prohibitions of the 13th Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement." (245 U.S. at 390; italics supplied).

Whatever we may now think of this *ex cathedra* pronouncement, it certainly left it open that, absent a

<sup>3</sup>The "assumption" of the court below that peacetime conscription may be constitutionally permissible is too broad, at least insofar as it assumes that peacetime conscripts may be used in overseas military involvements.

declaration of war, conscription may run afoul of the Thirteenth Amendment.

(3) Individual Justices of this Court have consistently and expressly reserved decision on these questions.

In *Hamilton v. University of California*, 293 U.S. 245 (1934), Justice Cardozo, speaking for himself and for Justices Brandeis and Stone, left open the question of the "limits of governmental power in the exaction of military service when the nation is at peace" (at 265).<sup>4</sup>

In the years since *Hamilton*, the question has sharpened. Today the issue is not whether the Constitution permits a state to condition attendance at its university upon the taking of military training courses; it is rather whether the Constitution permits Congress, without a declaration of war, to conscript Americans whom the Executive thereafter sends overseas to fight in an undeclared war.

To date, no four Justices of the present Court have seen fit to take any of the recent cases which would

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<sup>4</sup>*Hamilton* did not present a question of conscription into the armed forces of the United States. Neither the majority nor Justice Cardozo regarded ROTC training as anything like conscription—much less like involuntary overseas combat duty:

"The petition is not to be taken as showing that the students required . . . to take the prescribed course thereby serve in the army or in any sense become a part of the military establishment of the United States" (293 U.S. at 259).

" . . . petitioners have not been required to bear arms for any hostile purpose, offensive or defensive, either now or in the future. They have not even been required . . . to join in courses of instruction that will fit them to bear arms" (*ibid.*, at 265-266).

have compelled the Court to address itself to these questions. But the questions are here and now; they are in this case and they are in Judge Wyzanski's opinion; they cannot be ignored. They will not go away. An entire generation of young Americans is apparently prepared to see to that.<sup>5</sup>

(4) The continued and increasing resistance of young Americans to participation in the Vietnam war has led to the continued and increasing use of the criminal provisions of the conscription laws.<sup>6</sup> The use of the criminal process has in turn resulted in the attempted raising, as defenses to the criminal prosecutions, of questions of the nature of those here being urged. Quite uniformly, the lower federal courts have rejected these defenses and have said to young America:

"You can't raise 'political' questions; you can either accept the 'political' decision to conscript you to fight in an undeclared Asian war or you can go to jail."

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<sup>5</sup>We are heartened in once again pressing the issue by the fact that denials of certiorari carry "no implication whatever regarding the Court's views on the merits." (*Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917 [1950], Frankfurter, J.)

"Wise adjudication," said Justice Frankfurter, "has its own time in ripening" (*ibid.*).

We suggest that the time is now ripe and indeed overripe for the Court to address itself to questions which present some of the basic issues alienating the young people of our society from their government.

From Nuremburg to Tonkin to Pinkville, the "ripening" has taken place.

<sup>6</sup>This Court has pretty well emasculated any resort to civil remedies (*Clark v. Gabriel*, 393 U.S. 256 [1968]).

But the citizens of a constitutional republic who, under threat of imprisonment, are compelled to travel to distant lands to fight in an undeclared war have the right to challenge what is being done to them. If those most directly affected cannot make such a challenge, who then can? And what is the constitutional validity of a juridical theory that tells these citizens that they cannot make the challenge because the questions they raise are "political"?

(5) At least two Justices of the present Court have indicated a willingness to explore these questions and have been dissatisfied that this tribunal, which is the physical embodiment of "the rule of law" in America, should fail to treat of matters so profoundly affecting the younger 50% of our people.

In March of 1967, almost three years ago now, Mr. Justice Douglas expressed the first dissent from this "hands off" policy when, in *Mitchell v. United States*, 386 U.S. 972 (1967), he noted that a "recurring question in present-day Selective Service cases" was whether the provisions of the Treaty of London, 59 Stat. 1544, upon which the Nuremburg principle was based, constituted a defense to a prosecution for refusing to be conscripted to fight in Vietnam. He noted that Mr. Justice Jackson had stated, way back in 1945:

"If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us." (386 U.S. at 973).



Our clients have repeatedly asked us, and we respectfully ask this Court, whether what Justice Jackson said in 1945 is the law in 1969—the year of Pinkville. If it is not, who undid it? If it is, then why may not those most directly affected by it raise the issue?

Later in 1967, Mr. Justice Stewart dissented from the denial of certiorari in *Mora v. McNamara*, 389 U.S. 934 (1967). There draftees had sought relief against orders to report to Vietnam and had asked for a declaration that American action in that country was “illegal.” Mr. Justice Stewart found that the issues presented, some of which were “akin to those referred to by Mr. Justice Douglas in *Mitchell* . . .” were “of great magnitude.” To him, they presented “large and deeply troubling questions” and he told his brethren, the bar, our clients, and all who would listen that “we cannot make these problems go away by simply refusing to hear the case. . . .” (389 U.S. at 935).<sup>7</sup>

The history of the last two years has borne out Mr. Justice Stewart’s prediction. The “problems” have not gone away; nor can any intelligent person reasonably think that they are likely to go away. Indeed, in the last two years they have recurred again and again and again.

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<sup>7</sup>Mr. Justice Douglas joined in the opinion and wrote an opinion of his own in which Mr. Justice Stewart concurred. Mr. Justice Douglas’ opinion emphasized that the Court could not avoid its responsibility to the litigants (and to history) by refusing to consider the claims presented on the ground that they were “political.” (389 U.S. at 935-939).

In the later case of *Holmes v. United States*, 391 U.S. 936 (1968), Mr. Justice Douglas noted that the questions here urged are "important" and "recurring" and come to the courts "in various forms in many cases as a result of the conflict in Vietnam." (at 949).<sup>8</sup>

In *McArthur v. Clifford*, 393 U.S. 1002 (1968), which once again posed questions arising out of the Vietnam war, Mr. Justice Douglas made it clear that to duck consideration of these issues on the ground that they present "political" questions is "to abdicate the judicial function which the Court honored [even] in the midst of the Civil War," referring to *The Prize Cases*, 2 Black 635 (1863). Cf. *Baker v. Carr*, 369 U.S. 186 (1962), and *Powell v. McCormack*, 395 U.S. 486 (1969).

In *McArthur*, the Justice noted that the question of "whether men may be sent abroad to fight in a war which has not been declared by Congress is "[a]n important unresolved constitutional issue of immediate importance to many Americans . . ."

"Whenever the Chief Executive of the Country takes any citizen by the neck and either puts him in prison or subjects him to some ordeal or sends

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<sup>8</sup>In *Holmes*, Mr. Justice Stewart indicated that he did not join Mr. Justice Douglas only because in his view that case did not involve "the power, in the absence of a declaration of war, to compel military service in armed international conflict overseas." If that question had been presented there (as it is here) Mr. Justice Stewart stated unequivocally that he would have voted with Mr. Justice Douglas to grant certiorari.

Similar questions were presented in *Hart v. United States*, 391 U.S. 956 (1968), where Mr. Justice Douglas again dissented from the denial of certiorari.

him overseas to fight in a war, the question is justiciable"

\* \* \*

"The specter of executive war-making is an ominous threat to our republican institutions. What can be done in Viet Nam can be done in many areas of this troubled world without debate or responsible public decision." (393 U.S. at 1002-1003).

(B) On the merits, the questions must be decided in a way which leads to the affirmance of the judgment below.

The statement of the reasons why the questions presented are important, *supra*, pages 4 to 13, really constitutes a statement of why the decision of Judge Wysanski needs to be affirmed.

We may briefly supplement what we have heretofore said with the following observations.

(1) As to the war declaring power:

The problem is that the decision-making system established by the Constitution has broken down. Congress was intended to play a major role in the initiation of wars, yet in this war it has played almost no role. This is more than a mechanical failure. The war in Vietnam is itself evidence of the wisdom of the framers' decision to put in the Congress the power to declare war. And, contrary to some arguments, it is even more important that that power be exercised in limited wars with limited objectives than in general war. For, as the Vietnam experience amply demonstrates, it is only in Congress that a full, frank, open discussion of the merits of committing troops to a

foreign war has even a chance of taking place. Such a discussion, which can lead to a clear, rational definition of the limits of American objectives in a war, can only take place in the halls of Congress.

If the courts continue to permit the Executive to by-pass Congress, the process of decision-making envisioned in the Constitution will break down even further.<sup>9</sup> If the courts continue to refuse to hear Vietnam issues, that process will continue to fail to function properly. It is precisely at a point such as this, where a serious defect has appeared in the political process, that this Court is most justified in intervening to correct the situation. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952).

(2) As to this government's treaty obligations:

In this nuclear age, it is self-evident that domestic law must give way to international law if the world is to survive mankind's mounting destructive capabilities. Strong pleas for recognition of the need for giving precedence to international law are meeting with more and more success. Thus, the United Nations Charter Supremacy Clause, Article 103, provides

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Interestingly enough, and perhaps even more important for decision in this case, almost two hundred

<sup>9</sup>See Mr. Justice Douglas' observation that what is happening in Vietnam can happen in other areas of the world, *supra*, pp. 12-13.

years ago the Constitution of the United States was written to provide that

“... all treaties, made . . . under the authority of the United States, shall be the Supreme law of the land and the judges . . . shall be bound thereby . . .” United States Constitution, Article VI, Section 2.

The cases that have applied and sustained this power against conflicting state and federal legislation are legion and it would be a work of supererogation to cite them. But, sadly, it appears to be one thing to protect migrant birds (*Missouri v. Holland*, 252 U.S. 416 [1920]) and another to protect young Americans who refuse to become unwilling migrant warriors.

(3) As to the use of Americans in an undeclared overseas conflict:

An individual's personal rights should be equal to, if not greater than, an individual's property rights. Government can no more force an individual to engage in an illegal act than it can seize private property without just compensation. In *Youngstown Sheet and Tube, supra*, this Court enjoined the President himself from acting on the assumption that as Commander in Chief of the armed forces he could, “without support of law, . . . seize persons or property because they are important or even essential for the military and naval establishment.” (343 U.S. at 646 [concurring opinion]).

A soldier seized by the government, no less than a steel company, is protected by the Fifth Amendment. The legal power of the government to ship a soldier to Vietnam rests upon weaker grounds than the govern-



ment's power to seize steel plants. In *Youngstown* the government failed to sustain its burden, even in light of the Korean conflict and a United Nations action. In the case of Vietnam there has been no approval by the United Nations of the United States action. The government cannot summarily violate its constitutional restrictions. The conscription of a young man into a pool of military manpower for Vietnam under the circumstances here presented is a violation of the Constitution.

(4) As to the constitutional question if the Court refuses to hear appellee's contentions:

To put it bluntly, John H. Sisson, Jr., a young American of unquestioned integrity, has said, as have thousands upon thousands of his contemporaries, that he cannot and will not participate in the war in Vietnam, for reasons which touch upon the deepest chords of his existence as a responsible human being. For their like refusal to participate in the organized slaughter of Asian people young Americans by the thousands are being threatened with jail. They turn to their lawyers and ask a simple question: Must we murder Vietnamese or go to jail? As their lawyers, we now ask this Court: Does the Constitution of the United States permit our clients to be imprisoned because they are refusing to be conscripted to participate in an undeclared foreign military "action"?

These questions have by this case now been placed before this Court. We lawyers of the Selective Service Panel and our clients have struggled with them

in the lower courts for over two years now. We await this Court's answer. So indeed does the world.

We think that the American Constitution is more important than the war in Vietnam.

We urge this Court to decide that this is so, by affirming Judge Wyzanski's decision in this case.<sup>10</sup>

Dated, San Francisco, California,  
December 31, 1969.

Respectfully submitted,

LAWYERS' SELECTIVE SERVICE  
PANEL OF SAN FRANCISCO,

By NORMAN LEONARD,

*Attorney for Amicus Curiae.*

<sup>10</sup>Judge Wyzanski's opinion that a "selective" conscientious objector has a constitutional right to exemption from combat in Vietnam and therefore from induction into the armed forces has been buttressed by the recent opinion of Judge Weigel of the Northern District of California in *United States v. Bowen*, \_\_\_\_ F. Supp. \_\_\_\_ (1969) [Criminal No. 42449, December 24, 1969]. Judge Weigel held that Section 6(j) of the Military Selective Service Act of 1967, 50 U.S.C. App. 456(j), is unconstitutional because it discriminates between those religious beliefs which condemn opposition to all wars and those which condemn opposition only to "unjust" wars.

Judge Wyzanski's opinion that §6(j) invalidly discriminates between religious and non-religious conscientious objectors has been buttressed by the recent decisions of Judge Masterson of the Eastern District of Pennsylvania (*Koster v. Sharp*, 303 F. Supp. 837 [1969]) and Judge Cohen of the District of New Jersey (*Goguen v. Clifford*, 304 F. Supp. 958 [1969]). In both these cases it was held that the legislative standard of "religious training and belief" is violative of the First Amendment's proscription of the establishment of religion and of the due process and equal protection guarantees of the Fifth and Fourteenth Amendments.

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IN THE  
**Supreme Court of the United States**  
October Term, 1969

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**No. 305**

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UNITED STATES OF AMERICA,

*Appellant,*

*v.*

JOHN HEFFRON SISSON, JR.,

*Appellee.*

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On Appeal from the United States District Court,  
District of Massachusetts

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**BRIEF OF AMERICAN JEWISH CONGRESS,  
AMICUS CURIAE**

---

**Interest of the *Amicus***

The American Jewish Congress is a national organization of American Jews, founded more than 50 years ago to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy. We are especially committed to preservation of the great freedoms secured by the First Amendment. Since the case before the Court raises issues concerning the First Amend-





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ment's guaranty of religious liberty and the separation of church and state as well as issues arising under the Fifth Amendment, we have sought and obtained the consent of the parties to the submission of this brief *amicus curiae*.

### Preliminary Statement

This Court is asked in this case to consider the constitutionality of Section 6(j) of the Military Selective Service Act of 1967 insofar as it limits the exemption from combat training and service granted to conscientious objectors to one who "by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 U.S.C. App. 456(j). Expressly excluded from the term "religious training and belief" are "essentially political, sociological, or philosophical views, or a merely personal moral code" (*ibid*).

The appellee, John Heffron Sisson, Jr., refused to accept induction into the armed forces of the United States because he was "conscientiously opposed to service" in the Vietnam war on nonreligious grounds. A jury in the United States District Court for the District of Massachusetts found him guilty of having unlawfully refused to comply with his draft board's order to submit to induction. Chief Judge Wyzanski, however, granted Sisson's motion in arrest of judgment, holding (1) that, "in granting to the religious conscientious objector but not to Sisson a special conscientious objector status, the Act, as applied to Sisson, violates the provision of the First Amendment that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof,'" and

(2) that the statute unconstitutionally discriminates against a person conscientiously opposed to American participation in the Vietnam war as immoral and unjust who does not also object to service in all wars.

The case is here on the Government's direct appeal from the District Court.

### **Questions to Which This Brief Is Addressed**

This brief is addressed to two questions: (1) Whether Congress may constitutionally limit the draft exemption of conscientious objectors to those whose opposition is based on religious grounds; and (2) whether Congress may constitutionally limit the draft exemption of conscientious objectors to those who are opposed to participation in war in any form.

### **Summary of Argument**

I. Limiting exemption from military service on the basis of conscientious exemption to those whose objection is based on religion constitutes preferential treatment of believers over nonbelievers in violation of the No-Establishment Clause of the First Amendment.

A. The No-Establishment Clause requires the government to maintain neutrality not only among religions but also as between believers and nonbelievers. The Clause prevents the government from throwing its support to one side of an issue that must be resolved by each man in his own conscience. In arguing below that Section 6(j) unconstitutionally excludes nonreligious, ethical conscientious

objectors from exemption, we refer to discrimination against those whose objection is based on what may be regarded as a "faith" on a par with religious creeds, rather than what Section 6(j) refers to as "political \* \* \* views."

B. The existence of conscientious objection on non-religious grounds is well recognized. Hence, the question arises whether the government may make a distinction, in granting exemption from military service, between conscientious objection which rests on a religious base and that which rests on a nonreligious, ethical base.

C. A distinction between believers and nonbelievers cannot be made by government except to promote a compelling governmental interest. In this case, such an interest is lacking. If the grant of exemption is designed to support freedom of religion, its discrimination against nonbelievers is clearly unconstitutional. Neither can it be argued that the distinction is justified by considerations of convenience because of the identifiable nature of religious objection.

D. The distinction between religious and nonreligious objection runs afoul of the First Amendment because it requires draft boards and the reviewing courts to make theological determinations.

II. Limiting exemption from military service on the basis of conscientious objection to those whose objection is to all wars constitutes preferential treatment of adherents of some religious or ethical systems over others in

violation of the No-Establishment Clause of the First Amendment.

A. The Constitution prohibits government from making distinctions among religious sects. Such a distinction is made by Section 6(j). This does not mean that the Constitution requires military exemption for any form of conscientious objection but only that it bars distinctions among different bodies of religious or ethical belief.

B. Conscientious objection to a particular war or type of war is properly regarded as based on a body of belief analogous to religious conscientious objection to all wars. This is true even if the objection is based in part on a political judgment. The Government has failed to show compelling reasons to justify discrimination between the two forms of objection.

There is a basis in Jewish tradition for selective conscientious objection. However, the ultimate test is whether the individual registrant sincerely believes that nonparticipation in a war or type of war is required by his religious or ethical belief.



## ARGUMENT

### POINT ONE

**Limiting exemption from military service on the basis of conscientious exemption to those whose objection is based on religion constitutes preferential treatment of believers over nonbelievers in violation of the No-Establishment Clause of the First Amendment.**

#### **A. The Constitutional Requirement of Neutrality Between Religion and Non-Religion**

The No-Establishment Clause has consistently been interpreted to require government to maintain neutrality, not only among religions, but also "in its relations with groups of religious believers and non-believers." *People ex rel. Everson v. Board of Education*, 330 U.S. 1, 18 (1947). This position was expressed more fully in the following statement from *Everson* (at 15-16):

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. *Neither can force, nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance \* \* \** In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." (Emphasis added.)

The Court went on to say (at 16):

[The State] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. (Emphasis in original.)

The *Everson* interpretation has been repeatedly reaffirmed by this Court: *People ex rel. McCollum v. Board of Education*, 333 U.S. 203, 210-211 (1948); *McGowan v. Maryland*, 366 U.S. 420, 443 (1961); *Torcaso v. Watkins*, 367 U.S. 488, 492-493 (1961); *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 216 (1963). As stated in *Schempp*, "this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another" (374 U.S. at 216). See also Brennan, J. concurring, *id.* at 299: "The State, must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion." Again, in *Torcaso, supra*, this Court said that the government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers" (367 U.S. at 495). Most recently, this Court said in *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968):

The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.<sup>1</sup>

The requirement of government neutrality is a corollary more of the no-establishment than of the religious freedom

1. See also Justice Black, dissenting in *Zorach v. Clauson*, 343 U.S. 306, 320 (1952):

The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law.

aspect of the First Amendment. Its thrust is to prevent the government from throwing its support to one side of an issue that must be resolved by each man in his own conscience. It is for that reason that, as to that aspect of the First Amendment, it is not necessary to show that the offending act forces a person to profess a religious belief. Thus, in *Engel v. Vitale*, 370 U.S. 421 (1962), this Court held that a prayer program instituted in a public school system in New York was unconstitutional, even though students were not required to participate in it. The Court said (at 430):

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

It may be assumed for the purpose of this brief that the conscientious objection exemption is a privilege granted by Congress rather than a right guaranteed by the Constitution. See *United States v. Macintosh*, 283 U. S. 605 (1931); *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934); *In re Summers*, 325 U. S. 561 (1945). However, while a government may grant or withhold a privilege, it cannot condition its availability on unconstitutional grounds. In *Speiser v. Randall*, 357 U. S. 513 (1958), California had required an applicant for a certain tax exemption to affirm that he did not advocate the overthrow of the Government. This Court said (at 518):

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them

for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.

Similarly, in *Torcaso*, the argument that a religious test oath for notaries public was valid since "a person is not compelled to hold public office" was specifically rejected. 367 U. S. at 495-496.

It is noteworthy that, in *Everson*, this Court referred to " \* \* \* Non-believers, \* \* \* or the members of any other faith \* \* \*," thus treating the philosophical system of non-belief as a faith. Even though the sentence goes on to refer to "faith, or lack of it," we believe the first formulation has validity here. In arguing below that Section 6(j) unconstitutionally excludes nonreligious, ethical conscientious objectors from exemption, we refer to discrimination against those whose objection is based on what may be regarded as a "faith" on a par with religious creeds, rather than what Section 6(j) refers to as "political \* \* \* views."<sup>2</sup> We urge a formula similar to, but going beyond, that laid down in *United States v. Seeger*, 380 U. S. 163 (1965). There, this Court interpreted Section 6(j) as it then read<sup>3</sup> so that (at 166-167):

\* \* \* the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and mean-

2. Section 6(j) provides in part: "As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a 'merely personal moral code.'"

3. At the time of the *Seeger* decision, Section 6(j) contained the following sentence: "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, \* \* \*"

ingful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.

We urge below that a nonreligious, ethical conscientious objector, viewed by a similar standard, cannot be excluded from an exemption available to others on a religious basis.<sup>4</sup>

#### **B. The Limitation of the Exemption to Conscientious Objection on Religious Grounds**

The *Everson* interpretation has been applied to protect the rights of atheists who refuse to participate in religious instruction in public schools (*McCullum*), or in school prayer or Bible reading programs (*Engel*; *Schempp*), or who apply for public office (*Torcaso*). Surely those who conscientiously refuse to take human life deserve the same protection. Such an application of that protection would seem a logical step. As stated by Justice Frankfurter in his separate opinion in *McCullum* (333 U. S. at 212-213):

The case, in the light of the *Everson* decision, demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer. This is so because the meaning of a spacious conception like that of the

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4. Acceptance of the argument made here would not mean that such rulings of this Court as those in *Sherbert v. Verner*, 374 U.S. 398 (1933) (barring penalization by the state of those who for religious reasons observe a Sabbath other than Sunday) or *In re Jenison*, 265 Minn. 96, reversed, 375 U.S. 14 (1963), 267 Minn. 136 (1964) (same as to service on a jury), would be extended to all similar situations where the person's motivation was other than religious. Any extension would properly be limited to those who acted on a sincere and meaningful belief on a par with religious belief.



separation of church from state is unfolded as appeal is made to the principle from case to case.<sup>5</sup>

We submit that conscientious objection on ethical, moral but nonreligious grounds cannot be placed constitutionally on a lower plane than religious conscientious objection. Society has recognized that nonreligious objection can be "conscientious."

A "conscientious objector" has been defined as "one who refuses or is exempted from service in the armed forces as contrary to his moral or religious principles." Webster's Third International Dictionary (1961). And Harlan Fiske Stone (later Chief Justice) reminded us long ago that, "While conscience is commonly associated with religious convictions, all experience teaches us that the supreme moral imperative which sometimes actuates men to choose one course of action in preference to another and to adhere to it at all costs may be disassociated from what is commonly recognized as religious experience." Stone, *The Conscientious Objector*, 21 Columbia University Q. 253, 263 (1919).

Congress itself, by restricting Section 6(j)'s application to religious objectors, has impliedly recognized the ex-

5. In the *Selective Draft Law Cases*, 245 U.S. 366 (1918), a contention that the 1917 Draft Act violated the No-Establishment and Free Exercise Clauses of the First Amendment was dismissed with no discussion of the issue (at 389-390). We submit that the decisions of this Court interpreting the First Amendment during the last two decades destroy the validity of that unrationalized holding. Moreover, it is questionable whether the registrants in that case had standing to raise any question under the First Amendment. See, Mansfield, "Conscientious Objection—1964 Term," 1965 *Religion and Public Order* 379.

istence of nonreligious objectors. Indeed, the government has in the past recognized their sincerity. Although the Draft Act of 1917 exempted religious objectors only, the Secretary of War in 1917 instructed that "personal scruples against war" be considered as constituting "conscientious objection." An order from the Adjutant General of the Army, dated December 19, 1917 (printed in Selective Service System Monograph No. 11, Conscientious Objection, vol. 1, p. 54 (1950)) stated that:

The Secretary of War directs that until further instructions on the subject are issued "personal scruples against war" should be considered as constituting "conscientious objection" and such persons should be treated in the same manner as other "conscientious objectors" under the instructions contained in confidential letter from this office dated October 10, 1917.

A similar extension of the benefit of exemption from combatant service to nonreligious conscientious objectors was effected by President Wilson's Executive Order of March 20, 1918. That order directed assignment to noncombatant service for draftees who objected to participating in war because of "other conscientious scruples" as well as for those exempt under the Selective Service Act because of religious objections. U. S. War Office, Statement Concerning the Treatment of Conscientious Objectors in the Army (1919) 38-9.

The sincerity of non-religious conscientious objectors has been recognized in Great Britain by legislation which exempted all whose objections were conscientious, regardless of the basis for objection. National Services Act of 1948, 11 & 12 Geo. 6, c. 64, §17. For a discussion of the

British experience, see Sibley and Jacob, *Conscription of Conscience* (1952) 4-7; Cornell, *The Conscientious Objector and the Law* (1943) 119-121.

What is the basis for the grant of draft exemption for conscientious objection, which has such a long history in this country? It is likely that a primary motive is that it is shocking to the conscience to force a man to kill another in violation of deeply-held principles. To do so might well raise questions under the Due Process Clause as to whether such government compulsion is not inconsistent with the principles of an ordered society.<sup>6</sup>

However, it is not necessary in this case to argue that such compulsion is so repulsive to the conscience of society as to be at all times unconstitutional. The issue here is whether it is unconstitutionally arbitrary, and violative of the No-Establishment Clause, to recognize the compelling nature of this compulsion in the case of religious objection but not in the case of nonreligious, ethical objection. That issue must be resolved in the light of the reasons that may be given for the distinction drawn by the statute.

### C. The Arbitrary Nature of the Distinction Between Religious and Nonreligious Objection

#### 1. The test of reasonableness in First Amendment cases

For legislation abridging a liberty secured by the First Amendment a rigorous test is imposed. "The rational

6. *Rochin v. California*, 342 U. S. 165, 172 (1952) is authority for the proposition that the Due Process concept bars government compulsion that "shocks the conscience." In that case, the use of evidence obtained by forcibly "stomach pumping" the accused was held to violate the Due Process Clause of the Fourteenth Amendment. See also *United States v. Townsend*, 151 F. Supp. 378 (D. C. Dist. Col., 1957).

connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas v. Collins*, 323 U. S. 516, 530 (1945). "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill v. Alabama*, 310 U. S. 88, 95-96 (1940); *Sherbert v. Verner*, *supra*, 374 U. S. at 406. See also *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 639 (1943).

This Court recently had occasion to make clear that this approach applies generally to all fundamental constitutional rights. In *Shapiro v. Thompson*, 394 U. S. 618 (1969), it rejected reasonable considerations of convenience in invalidating state laws limiting welfare benefits to persons who had resided a minimum length of time within the state. After referring to the holding in *United States v. Guest*, 383 U. S. 745 (1966) that the right to travel among the states "occupies a position fundamental to the concept of our Federal Union" (at 630), this Court said (at 634):

At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification . . . [A]ny classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional. (Emphasis in original.)

The *Torcaso* case, *supra*, provides an example of the application of this approach. Absent the First Amendment, it could not be said that the state's apparent determination there that believers in God are likely to be more honest and conscientious civil servants than nonbelievers was arbitrary and unreasonable. Indeed, the state there argued that it could hardly be deemed unreasonable to require that a notary public (the office involved in that case) who is given the power to administer oaths himself believe in God. Brief for Appellee in *Torcaso*. (October Term 1960, No. 373), p. 19. As noted by the Court in *Sherbert v. Verner*, *supra*, 374 U. S. at 410n, there was in *Torcaso* "an undoubted state interest in ensuring the veracity and trustworthiness of Notaries Public." But the answer, as *Torcaso* makes clear, is that there are certain classifications which the First Amendment forbids government to make, irrespective of their possible factual reasonableness, and one of these is a classification based upon a belief in God.

The Sunday Law cases, and specifically *Gallagher v. Crown Kosher Market*, 366 U. S. 617 (1961), and *Braunfeld v. Brown*, 366 U. S. 599 (1961),<sup>7</sup> are not inconsistent with this assertion. The Court there held that Sunday laws are today secular laws for the purpose of ensuring a uniform day of rest, and that the states are not constitutionally required to accord exemptions for religious reasons. But nothing in the Court's decision can be interpreted to give any support to an argument that the states could constitutionally exempt adherents of certain non-Christian religions from the operation of the statute while withholding the

7. We suggest that the force of these decisions has been substantially weakened by *Sherbert v. Verner*, *supra*.



exemption from adherents of other faiths. We are confident that this Court would not uphold a statutory exemption to Sunday laws in favor of only those who observe Saturday as their holy day of rest but denied it to those who, with equal religious sincerity, observe Friday as their holy day of rest. Nor, we suggest, would the unconstitutionality of such a classification be mitigated by a not unreasonable state finding that policing problems would be much more difficult if the exemption were not limited to a single, specific day.

Nor can *Torcaso* be distinguished because in the present case the governmental interest involved is national defense. The interest of national defense might justify a refusal by Congress to grant any exemption from military service on grounds of conscience. *United States v. Macintosh*, *supra*, 283 U. S. at 623-4; *Hamilton v. Regents of the University of California*, *supra*, 293 U. S. at 263-5; *In re Summers*, *supra*, 325 U. S. at 571-3. But, we submit, nothing in those decisions supports the conclusion that, once Congress has elected to grant exemption to those who conscientiously object to military service, it can limit that exemption to those whose objection is based on religious grounds, excluding those who object, just as sincerely, on nonreligious grounds.


There was a time when assertion of the needs of national defense almost foreclosed all further judicial inquiry and freed government from the restraints imposed by the Bill of Rights. *Cf. Abrams v. United States*, 250 U. S. 616 (1919); *Hirabayashi v. United States*, 320 U. S. 81 (1943); *Korematsu v. United States*, 323 U. S. 214 (1944); Chafee, *Free Speech in the United States*, *passim*. Fortunately, that time has passed and hopefully will not return. *Cf.*

*West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943); *Ex parte Endo*, 323 U. S. 283 (1944); *Harmon v. Brucker*, 355 U. S. 579 (1958); *Kennedy v. Mendoza-Martinez*, 372 U. S. 144 (1963).

## 2. *The lack of justification for the statutory distinction*

The purpose of the exemption is either to prevent, or at least reduce, the possibility that a man will be forced to violate his religious conscience by fighting or, independently of religious considerations, it is to prevent or reduce the possibility of compelling a man to kill in a cause which his ethical system rejects. In the first case, we submit, the purpose—to benefit religion—directly violates the No-Establishment Clause. In the second, the drawing of the line on the basis of religious belief can be justified only by compelling governmental interest.

Any attempt to show that the purpose of the exemption is to give some form of limited, half-hearted support to the constitutional guarantee of freedom of religion faces an obvious obstacle. Fundamental to the government's case—and to the earlier decisions of this Court (see the *Macintosh*, *Hamilton* and *Summers* cases, *supra*)—is the argument that the Constitution does not require any exemption for religious conscientious objectors. Thus, the statutory exemption is not designed to fulfill a constitutional obligation. It is designed rather to do what is fair, and at the same time feasible, in striking a balance between the defense needs of the government and the needs imposed on the individual by his conscience. But in striking such a balance, the government may not make arbitrary distinctions and



certainly not distinctions between believers and non-believers.

Indeed, if the purpose of the statute is solely to preserve the religious expression which manifests itself in conscientious objection, it runs afoul of the test laid down in the *Schempp* case (374 U. S. at 222):

\* \* \* what are the purpose and the primary effect of the enactment? If either is the advancement or the inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

This test, we believe, bars any statutory distinction designed to advance religion but not nonreligion. As long as the individual acts out of "a given belief that is sincere and meaningful" and "occupies a place in the life of its possessor parallel to that filled by" religion, to use the language of the *Seeger* case, 380 U. S. at 166, there is ~~no~~ basis for discrimination that can withstand the constitutional command. It is true that *Seeger* used the quoted language in barring a distinction between two forms of religious belief—those which do and do not have "a relation to a Supreme Being." We do not claim that either the *Seeger* holding or the language quoted dispose of the issue here. We do believe, however, that the formulation there used can be aptly applied to the relationship between the two sets of belief involved here—religious and nonreligious objection to armed service—and that the cases cited above barring gov-

ernmental discrimination between religion and nonreligion apply to that relationship.

If, however, the purpose of the exemption is to avoid violation of ethical systems generally—to avoid offending the conscience of society—then the government has a heavy burden to bear in justifying a distinction on religious lines. As we show above (pp. 13-15), no mere considerations of convenience will suffice.

It may be argued that the necessary element of rationality for the distinction between religious and nonreligious objectors is supplied by the fact that nonreligious objection is too difficult to measure and adjudicate. Congress, the argument runs, must draw the line at a point where clear distinctions are possible. In World War I, as we know, exemption was given only to those conscientious objectors who adhered to a "well-recognized religious sect" (Act of May 18, 1919, ch. 15, Sec. 4, 40 Stat. 78), a relatively easy test to apply. In recent years, the test has been religious belief "in a relation to a Supreme Being."

The argument of convenience, we submit, has been effectively destroyed by this Court's decision in *Seeger* and the subsequent amendment of the statute. In *Seeger*, this Court accepted rather vague formulations of "religious" belief on the part of three registrants as falling within the statutory standard of conscientious objection warranting exemption.<sup>8</sup> Yet, the beliefs expressed by Sisson are so similar that it would take the most convincing case to show that a distinction between the two was not so arbitrary as to be

8. We see no reason to believe that the amendment of the statute subsequent to *Seeger* affects this aspect of the decision.

constitutionally impermissible. More important, the result of *Seeger* is that a person may now claim exemption because of religious conscientious objection on grounds no more clearly measurable than those of Sisson or any other non-religious, ethical objector. Thus, the argument based on convenience no longer applies.

In short, it has not been shown that the goal of maintaining national defense by conscripting an army cannot be achieved by means which do not impose a burden on nonreligious conscientious objectors. Great Britain, as we have seen, has found it possible to operate without distinguishing between religious and nonreligious objectors. And in this country there has been, so far as we know, no significant increase in applications for exemption following this Court's liberal application of Section 6(j) in *Seeger*. There is no reason to believe that the result would be different if Sisson is upheld in his contentions.

#### **D. The Involvement of Draft Boards in Theological Determinations**

The distinction between religious and non-religious objection creates another constitutional difficulty. Administration of the distinction imposes on draft boards and the reviewing courts the duty of making theological determinations. They must determine whether an applicant's formulation of the basis for his objection is religious or not.

This is no easy task. This Court itself has had difficulty with such theological questions. Cf. *Church of Jesus Christ of Latter Day Saints v. United States*, 136 U. S. 1



(1890); *United States v. Ballard*, 322 U. S. 78 (1944). A strong constitutional policy against involvement of civil agencies in the area of theology has been reflected repeatedly in decisions of this Court. *Watson v. Jones*, 80 U. S. 679 (1871); *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94 (1952); *Kreshik v. St. Nicholas Cathedral*, 363 U. S. 190 (1960); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440 (1969). As this Court said in *United States v. Ballard*, *supra*, 322 U. S. at 87: "When the triers of fact undertake that task [determination of truth or falsity of religious belief], they enter a forbidden domain."

A question may be raised as to whether a draft board or the reviewing court is to make the determination as to the religious character of the applicant's objection on the basis of its own standards or those of the applicant. In the *Seeger* case, this Court, interpreting an earlier version of Section 6(j), said (380 U. S. at 165-166):

\* \* \* the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. \* \* \*

After describing this test as essentially objective, this Court said (at 184-185):

Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight. \* \* \* The validity of what

he believes cannot be questioned. \* \* \* Their task [that of the boards and courts] is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.

It may be questioned whether, despite this language, the draft board must confine itself to whether the registrant regards his conscientious objection as "religious." Must it not, having heard the registrant's statement of his views, decide whether, in its own view, that statement embodies a "religious" belief? In any case, the boards and the courts are inevitably involved in the kind of theological determination which the cases cited above regard as unconstitutional.

## POINT TWO

**Limiting exemption from military service on the basis of conscientious objection to those whose objection is to all wars constitutes preferential treatment of adherents of some religious or ethical systems over others in violation of the No-Establishment Clause of the First Amendment.**

### A. Equality Among Sects

We have cited above the cases which, we believe, establish that government may not base statutory distinctions on whether a person acts out of religious rather than nonreligious, ethical motives. It is at least equally clear that government may not discriminate among religions. As this Court said in *School District of Abington Township, Pa. v. Schempp, supra*, 374 U. S. at 214:

Almost a hundred years ago in *Minor v. Board of Education of Cincinnati*, Judge Alphonso Taft, father

of the revered Chief Justice, in an unpublished opinion stated the ideal of our people as to religious freedom as one of "absolute equality before the law, of all religious opinions and sects \* \* \*."

In the *Seeger* case, the Court of Appeals for the Second Circuit rested its decision in favor of Seeger expressly on the ground that Section 6(j), as it then stood, unconstitutionally discriminated against those religions that did not include a belief in a Supreme Being; it held that, under this Court's decision in *Torcaso v. Maryland, supra*, "Government could not \* \* \* place the power and authority of the state 'on the side of one particular sect of believers.'"  
*United States v. Seeger*, 326 F. 2d 846, 853 (2d Cir. 1964). Although this Court affirmed that decision on statutory rather than constitutional grounds, nothing in its opinion undermines the validity of the Court of Appeals' conclusion on this point.

Applicable here also are the cases cited above (pp. 13-15) which establish that legislation limiting First Amendment rights is subject to a rigorous test. The distinction made in Section 6(j) between those religions that object to all wars and those that object only to some wars can be upheld only on the basis of a "compelling governmental interest." *Shapiro v. Thompson, supra*, 383 U. S. at 634.

The statutory limitation of the exemption to those who object to "war in any form" has already been cast in doubt. In *Sicurella v. United States*, 348 U. S. 385 (1955), a member of the Jehovah's Witnesses was denied classification as a conscientious objector on the recommendation of

the Department of Justice which found (as quoted in this Court's decision, 348 U. S. at 388):

While the registrant may be sincere in the beliefs he has expressed, he has, however, failed to establish that he is opposed to war in any form. As indicated by the statements on his SSS Form No. 150, registrant will fight under some circumstances, namely in defense of his fellow brethren.

This Court, however, upheld the registrant's claim to exemption, saying (348 U. S. at 390-391):

Granting that these articles picture Jehovah's Witnesses as anti-pacifists, extolling the ancient wars of the Israelites and ready to engage in a "theocratic war" if Jehovah so commands them, and granting that the Jehovah's Witnesses will fight at Armageddon, we do not feel this is enough. The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war. (Emphasis in original.) As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not appear to contemplate one in the future.

We submit that, by resting this decision on statutory grounds, the Court raised constitutional questions of a substantial nature. In effect, it required draft boards and reviewing courts to base their determinations on the content of the religious views of the registrant. This, indeed, is a fundamental defect of Section 6(j). That defect, as we have argued in Point One, invalidates the distinction between religious and nonreligious objection, which requires government officials to determine whether a set of prin-

principles is based on "religious" training and belief. But it also invalidates the distinction between objection to all war and more limited objection, which requires government officials to analyze the nature of the registrant's ethical system. In both cases, the government becomes involved in "controversies over religious doctrine." *Presbyterian Church, etc. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, *supra*, 393 U. S. at 449, and cases cited *supra*, pp. 20-21.

The burden of our position here is that Section 6(j) enacts an impermissible discrimination among religious sects. We do not contend (and we do not understand appellee as contending) that anyone has a constitutional right to exemption from military service because of conscientious objection. We contend only that Congress has drawn an improper distinction as to who may be exempted.

The Government misses this distinction when it argues that, if appellee is upheld, a person who objects to a particular war will be permitted to refuse to pay taxes for its support (Brief, pp. 44-5). The analogy is false because the law does not now waive taxes for conscientious objectors to all wars. It does, however, grant military exemption to such objectors and the issue is whether it may constitutionally limit the exemption in that fashion.

The analogy between objection to military service and objection to the payment of war taxes was made years ago by Justice Cardozo in a concurring opinion in *Hamilton v. Regents*, 293 U. S. 245, 268 (1934). In that case, however, the issue was not discrimination between different types of



objection but whether students could constitutionally be denied access to a state university because they refused to take military training. In that case, therefore, it could be argued that recognition of a constitutional right to enjoy state benefits free of a requirement of military service would necessarily establish a right to enjoy all state benefits without paying taxes.

We do not believe that that conclusion necessarily follows. There is a vast difference between requiring a man to bear arms and perhaps to kill in violation of his conscience and requiring him to pay taxes for what he regards as wrongful or immoral purposes. In any case, however, Justice Cardozo's argument does not apply in this case, where the issue is not constitutional right but the constitutional validity of statutory classification.

This same distinction also answers the Government's suggestion that this case involves a political question which the courts cannot decide—whether it is necessary to the national security to include conscientious objectors in the armed forces during this particular war (Brief, pp. 40-42). This case can and, we believe, should be decided on the basis of whether the distinction drawn in the statute as to who is and who is not exempt from military service is constitutionally sound. That is not a political question on which courts cannot act.

## **B. The Ethical Nature of Selective Objection**

The Government argues that selective conscientious objection "necessarily involves a political judgment," a judgment not involved in general conscientious objection,

and that this creates a "qualitative difference" which Congress could embody in the statute (Brief, pp. 47-48). But the Government does not deny that this distinction favors those religious groups that counsel nonparticipation in all wars over those whose ethical systems require a judgment between moral and immoral wars. Nor has it attempted to show that there are compelling reasons of state that would justify such discrimination. The Government says at one point that "Appellee's situation—as a non-religious selective objector—is, for understandable reasons, not included in the ambit of conscientious objection given legislative recognition" (Brief, p. 46n). The "understandable reasons" are nowhere set forth.

It may well be true that some ethical systems hold that the political aspects of a war are among the factors to be considered in reaching a judgment as to whether participation is objectionable to the conscience. Thus, Rabbi Irving Greenberg, after reviewing Jewish tradition on participation in war, says:<sup>9</sup>

It is also obvious from this that moral or spiritual judgments on a war cannot be made abstractly. The halachist [student of rabbinic law] must know the political military situation insofar as is possible, and the political judgments involved. For example: is there a direct possibility of physical or spiritual annihilation if I do not fight? Is the enemy system bent on my destruction? From these judgments flow the moral judgment, if any is possible.

But this does not make the ultimate decision against participation any less a matter of religious or ethical con-

9. "Judaism and World Peace: Focus Viet Nam," published by Synagogue Council of America (1966), p. 20.

science, nor does it supply a sufficient justification for a statutory distinction favoring those ethical systems that do not consider political factors over those that do.

We shall not attempt an extensive demonstration that some religious systems do distinguish among wars in deciding whether there is a moral requirement to refrain from participation. In a sense, any such presentation is irrelevant to the issues in this case. Even within the assumption that the statutory exemption is validly limited to religious objectors to all wars, determinations must be made on the basis of the registrant's own religious system, not on whether there is a body of belief officially established by a religious body for all its followers. As this Court said in *Seeger* (380 U. S. at 184), “\* \* \* it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways.” However, it is useful to show that there are elements in Jewish law which could rationally persuade some Jews to believe that selective resistance to war is a moral imperative.<sup>10</sup>

One element in the anti-war tradition was Isaiah's prophecy of universal peace (Isaiah 2:4; Micah 4:3-4; see also Zachariah 4:6; Isaiah 30:15; Hosea 1:7). The *Midrash* says (*Leviticus Rabbah*, Tzav, IX, 9):

10. In the recent decision in *United States v. Bowen*, U.S.D.C., N.D., Cal., Cr. No. 42499, decided December 24, 1969, the District Court found ample evidence that a substantial number of Catholic leaders believe that Catholic tradition requires members of that communion to distinguish between service in “just” and “unjust” wars and that “communicants of other faiths—Protestant and Jewish—have ample doctrine in their religion to support similar religious conscientious objection.”

R. Simeon b. Yohai said: Great is peace, since all blessing are comprised therein, as it is written, *The Lord will give strength unto His people; the Lord will bless His people with peace* (Ps. xxix, 11). Hezekiah said two things. Hezekiah said: Great is peace, for in connection with all other precepts it is written, *If thou meet*, etc. (Ex. xxiii, 4), *If thou see* (ib. 5), *If there chance* (Deut. xxii, 6), which implies: if a precept comes to your hand, you are bound to perform it. In this case, however, [it says], *Seek peace, and pursue it* (Ps. xxxiv, 15), [meaning] seek it for thine own place and follow it to another place.

This principle is strengthened by specific teachings and laws (*Sanhedrin*, 74a):

\*\*\* in every other law of the Torah, if a man is commanded "Transgress and suffer not death" he may transgress and not suffer death, excepting murder \*\*\* murder may not be practiced to save one's life. \*\*\* Even as one who came before Raba and said to him, "the Governor of my town has ordered me 'Go, and kill so and so; if not, I will slay thee.'" He answered him, "Let him rather slay you than that you should commit murder; who knows that your blood is redder? Perhaps his blood is redder?"

See also *Pesikta Rabbati*, 21:18; *Mishnah Sanhedrin*, IV, 5.

More specifically, distinctions among wars are a vital part of Jewish law. Rabbi Seymour Siegel tells us:<sup>11</sup>

The tradition has three categories of war; an obligatory war (*milchemet chova*); an imperative war (*mil-*

11. "Judaism and World Peace," *op. cit. supra*, p. 13.

*chemet mitzvah*); and a war of choice (*milchemet reshut*).

In the case of the war of choice, a number of exemptions from military service are recognized.<sup>12</sup> One student of Jewish tradition has concluded that Jewish sources can provide support for every conceivable position from militarism to absolute pacifism.<sup>13</sup>

But what matters is not what authority teaches but what the individual believes. "Judaism considers each individual personally responsible before God for his action."<sup>14</sup> As stated by Rabbi Arthur J. Lelyveld:<sup>15</sup>

In the realm of conscience every individual is in the last analysis alone with the Ribono Shel Olam, the source of Ultimate Demand. In Judaism, the nature of that demand is illuminated by the experience of the group which preserves it and transmits it. Out of our history and our affirmations we have a developed value-stance from which we approach the situations that require decision and from which we test the validity of the ideals that are normative in our tradition.

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12. Gendler, Everett E., "War and the Jewish Tradition," in *A Conflict of Loyalties; the Case for the Selective Conscientious Objector*, James Finn, ed. (1968).

13. Cronbach, Abraham, in *46 Yearbook of the Central Conference of American Rabbis*, 198 (1936).

14. Resolution on "Conscientious Objection," adopted by the Commission on Social Justice of the Synagogue Council of America on and referred for approval to the Plenum of the Synagogue Council.

15. "Judaism and World Peace, *op cit. supra*, p. 26.



### Conclusion

We submit that the court below was correct in holding that, under the strictures of the First Amendment, the appellee could not be denied exemption from military service granted to others on the ground of conscientious objection, either because his objection was based on nonreligious rather than religious belief or because he did not object to all wars.

Respectfully submitted,

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January, 1970



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1969

No. 305

UNITED STATES OF AMERICA,

*Appellant,*

—v.—

JOHN HEFFRON SISSON, JR.,

*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MASSACHUSETTS

**BRIEF OF AMERICAN HUMANIST ASSOCIA-  
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### ARGUMENT:

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1969

No. 305

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UNITED STATES OF AMERICA,

*Appellant,*

—v.—

JOHN HEFFRON SISSON, JR.,

*Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MASSACHUSETTS

---

**BRIEF OF AMERICAN HUMANIST ASSOCIA-  
TION AND AMERICAN CIVIL LIBERTIES  
UNION, AMICI CURIAE**

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**Interest of *Amici*.\***

**Interest of American Humanist Association**

The American Humanist Association is an organization of individuals who believe that for man to realize his potential he must apply reason and the principles of science to the solution of his personal and social problems. Humanists believe that mankind has only itself to rely upon and only this life with which to be concerned. Therefore, humanists would agree with Albert Camus that:

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\* Written consents by the attorneys for both parties have been filed with the Clerk.

If there is a sin against life, it consists perhaps, not so much in despairing of life as in hoping for another life and in eluding the implacable grandeur of this life.  
*The Myth of Sisyphus.*

This interest in improving our present life has led humanists to be concerned about world peace. Many humanists, though by no means all, have reached the conclusion that any war and the participation in any armed conflict is morally unjustifiable. Others have concluded that only wars of aggression must be opposed. In addition, all humanists believe that conscientious objection should be afforded to those not formally religious as well as to those who are. The American Humanist Association believes that all are equally entitled to exemption and therefore requests permission to file this brief as Amicus Curiae in support of the appellee.

### **Interest of American Civil Liberties Union**

For a half-century the American Civil Liberties Union has defended the rights protected by the Bill of Rights. In particular, it has represented those who have asserted the rights of conscience and religious liberty protected by the First Amendment against government infringement. Indeed, the ACLU was founded in the crucible of the First World War to defend the rights of conscientious objectors to that war.

In accord with our commitment to the protection of conscience, the ACLU has taken the position that those whose conscience compels them to oppose a particular war are entitled to the same exemption from training and

service in the armed forces as is granted to the universal pacifist under the Military Selective Service Act of 1967. We file this brief in order to present to the Court our arguments of law which support that position.

### Questions Presented

1. Can a young man be forced to kill against the dictates of his conscience in a foreign military campaign which he finds immoral, at least where that campaign is not pursuant to a declaration of the war or in defense of the homeland?

2. May Congress grant an exemption from military service only to those whose objection to participation in war derives from sources which are "religious" in an orthodox or conventional sense, and not to those whose objection derives from less conventionally religious sources which are equally binding and conscientious?

### Statutes Involved

Section 12(a) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 462(a)) provides, in pertinent part:

Any \* \* \* person \* \* \* who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under \* \* \* this title \* \* \*, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both \* \* \*.



Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 456 (j)) provides, in pertinent part:

Nothing contained in this title \* \* \* shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. \* \* \*

#### Statement

On March 18, 1968, Local Board No. 114 Middlesex County, Massachusetts, ordered John H. Sisson, Jr., to report for induction. On April 17, 1968, Sisson reported for induction but refused to take the symbolic step forward. On March 21, 1969, a jury found him guilty of violating §462 of the Military Selective Service Act of 1967. Pursuant to Rule 34 of the Federal Rules of Criminal Procedure, Sisson on March 28, 1969, filed an amended motion in arrest of judgment, which was granted with opinion dated April 1, 1969.

Sisson graduated in 1963 from the Phillips Exeter Academy and in 1967 from Harvard College. He enlisted in the Peace Corps in July 1967, but after training he was, for reasons that have no moral connotations and no relevance to this case, "deselected" in September 1967. In January 1968 he went to work as a reporter for *The Southern Courier*, published in Montgomery, Alabama. That paper

assigned him to work in Mississippi, where he was when he received the induction order.

The first formal indication in the record that Sisson had conscientious scruples is a letter of February 29, 1968 in which he notified his Board that "I find myself to be conscientiously opposed to service in the Armed Forces. Would you please send me SSS Form No. 150 so that I might make my claim as a conscientious objector." On receiving the form, Sisson concluded that since his objection was not religious within the administrative and statutory definitions incorporated in that form, he was not entitled to have the benefit of the exemption described in it. He, therefore, did not complete and return the form.

Although the record showed no earlier formal indication of conscientious objection, Sisson's attitude as a non-religious conscientious objector has had a long history. Sisson himself referred to his moral development, his educational training, his extensive reading of reports about and comments on the Vietnam situation, and the degree to which he had familiarized himself with the U.N. Charter, the charter and judgments of the Nuremberg Tribunal, and other domestic and international matters bearing upon the American involvement in Vietnam.

The court below found that Sisson was sincere and that "[t]here is not the slightest basis for impugning Sisson's courage"; further, that he was not motivated by purely "political" considerations, but that "his table of ultimate values is moral and ethical . . . reflect[ing] quite as real, pervasive, durable, and commendable a marshalling of priorities as a formal religion. . . . What another derives from the discipline of a church, Sisson derives from discipline of

conscience. . . . He was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion." The Court concluded that his views were "not only sincere, but, without necessarily being right, are reasonable."<sup>1</sup>

### Summary of Argument

1. Sisson is entitled to exemption as a conscientious objector under the First, Fifth and Ninth Amendments even though his objection is selective and its sources not formally religious.

a. There is a right of conscience "whose principles are either religious or akin thereto," App. 23, implicit in the entire Bill of Rights, and explicit in the First Amendment to the Constitution. Invoking such right, Sisson is entitled to exemption from combat duty in a foreign undeclared war where there is no suggestion of a national need for his services.

b. The fact that Sisson's objection is limited to wars that he conscientiously and sincerely considers immoral cannot disqualify him from such an exemption without violating the free exercise of religion and establishment clauses. To grant the exemption only to universal religious pacifists discriminates invidiously against selective religious pacifists, and to favor any religious objectors over non-religious pacifists, selective or universal, discriminates in favor of such religious believers and against non-believers.

c. Permitting exemption for selective objectors is consistent with the statute.

<sup>1</sup> Appendix to Jurisdictional Statement 20-22. Citations to the opinion below will be to the Appendix to the Government's Jurisdictional Statement, and will be cited as "App. \_\_\_\_."

d. Such discrimination has not been justified by jeopardy to national interests of significant magnitude, for no showing thereof has been made or even attempted.

e. Allowing an exemption because of the lack of overriding need, when all the relevant facts are undisputed, does not implicate courts in "political questions" since such issues have often been considered by courts, nor does it harm the integrity of the democratic process, morale or efficiency.

2. It is an unconstitutional favoring of religion to grant exemption to religious conscientious objectors and not to those not formally religious in the statutory sense.

## ARGUMENT

### I.

**ONE WHO SINCERELY AND CONSCIENTIOUSLY OPPOSES A PARTICULAR WAR AS IMMORAL MAY NOT BE FORCED TO KILL, AT LEAST WHERE THAT WAR HAS NOT BEEN THE SUBJECT OF A CONGRESSIONAL DECLARATION OF WAR, AND DOES NOT ENDANGER THE HOMELAND.**

#### **A. Introduction: The Narrow Holding of the Court Below**

The problems properly raised by this case are as difficult and complex as any which have recently come before this Court. They are not, however, as far-reaching as the Government's Brief would make them.<sup>2</sup>

<sup>2</sup> In addition to its substantive arguments against recognition of selective conscientious objection, the Government urges that this Court should not even reach this question because Sisson's induc-

Put precisely, the district court held that under the First Amendment and the due process clauses, one who is sincerely opposed to a particular foreign military campaign as immoral cannot be forced into combat duty where he may be required to kill or be killed, where that campaign has not been authorized or ratified by a congressional

tion "would not immediately occasion his being sent to Vietnam, and would not necessarily result in his ever being sent there." Brief, p. 37. It is the essence of the decision below that the magnitude of Sisson's conscientious objection required a holding that he "cannot constitutionally be subjected to military orders (not reviewable in a United States constitutional court) which may require him to kill in the Vietnam conflict." App. 36 (Emphasis added). The court below obviously had good reason to be concerned about the availability of a constitutional court to a man in the military service who conscientiously objects to participation in an unjust war: The Government has consistently opposed Federal Court jurisdiction of such claims by servicemen, usually with the contention that Federal Courts should refrain from interfering with military duty assignments and travel orders. See *Noyd v. McNamara*, 267 F.Supp. 701 (D. Colo. 1967), *aff'd* 378 F.2d 538 (10th Cir. 1967), *cert. denied*, 389 U.S. 1022 (1967); *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967); see also *Orloff v. Willoughby*, 345 U.S. 83 (1953). For an illustration of judicial cognition of the inability to find a Federal forum to hear and decide anything but the jurisdictional question, see *United States v. Owens*, 415 F.2d 1308, 1316 (6th Cir. 1969), certiorari pending. That a selective conscientious objector—or indeed, any conscientious objector—cannot expect to find a hospitable forum within the military judiciary is sadly borne out by the series of frustrations experienced by Air Force Captain Dale Noyd. See *United States v. Noyd*, 18 USCMA 483, 40 CMR 195 (1969), affirming *United States v. Noyd*, ACM 20121, 39 CMR — (1968). See also *Mueller v. Brown*, 18 USCMA 534, 40 CMR 246 (1969); *Jones v. Lemond*, 18 USCMA 513, 40 CMR 225 (1969); *Lee v. Pearson*, 18 USCMA 545, 40 CMR 257 (1969). In sum, what Judge Wyzanski held is that a just war objector had a right to have his case considered by a constitutional court rather than a military tribunal in the context of a court martial, and that unless Sisson received his hearing in Judge Wyzanski's court there would be no assurance that he could receive it in any other constitutional court.



declaration of war, and where it is not made necessary in defense of an invasion or other immediate danger to the nation, and even though the source of the objection is not formally religious. The court did not, either directly or by implication, pass on the rightness of the Vietnam war, the availability of the so-called Nuremberg defense, the Government's powers of conscription, or any one of a host of other issues. More specifically, it did *not* rule that—

(1) A selective conscientious objector—or indeed, *any* conscientious objector—could be exempt, in peace or war, from any military service other than combat duty;<sup>3</sup>

(2) Civil disobedience of any kind was either legally or morally permissible (Gov't Brief 49, 48-49).

(3) The United States had no need in Vietnam for combat troops in general (Gov't Brief 41-42, 48-49).

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<sup>3</sup> The court below *assumed* "that a conscientious objector, religious or otherwise, may be conscripted for *some* kinds of service in peace or war," App. 27 (emphasis added), and limited its holding to a compulsory *combat* assignment in violation of conscience. Amici respectfully urge, however, that the logic of Judge Wyzanski's reasoning, as well as the constitutional imperatives discussed in this Brief, cannot allow any invidious distinction between compulsory combat service in violation of conscience and compulsory non-combatant military service in violation of conscience. Section 6(j) of the Military Selective Service Act of 1967, and all of its precursors in the statutory history of conscientious objection, have always recognized both categories of conscientious objection. The conscience of the man who can wear the uniform but cannot bear a weapon has never been thought to be more worthy of protection than the conscience of the man who cannot participate in military service in any capacity. Since both are recognized by statute, it would not be constitutionally permissible to include selective objectors of one category, but to exclude selective objectors of the other category. See *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Torcaso v. Watkins*, 367 U.S. 488 (1961). It must be conceded, however, that it is not necessary for this Court to adopt this argument in its full logical extension in order to affirm the judgment below.

Within this narrow compass, there are nevertheless two crucial issues:

(1) whether selective objection in these circumstances is constitutionally protected—and, as will be argued below, also statutorily authorized—and;

(2) whether a distinction between statutorily defined religious and non-religious objectors is unconstitutional.

**B. The First, Fifth, and Ninth<sup>4</sup> Amendments Create a Right to Conscientiously Refuse to Kill Which Is Not Forfeited by the Selective Nature of the Objection**

**1. Sources of the right of conscientious objection**

"Two things fill me with awe," wrote Immanuel Kant, "the starry heavens above and the moral law within." It is this "moral law within" which impelled John Sisson to refuse to be subjected to combat duty, to kill in a war he considered immoral. "[B]oth morals and sound policy require that the state should not violate the conscience of the individual," wrote Harlan Fiske Stone, in *The Conscientious Objector*, 21 Colum. U.Q. 253, 269 (1919), quoted in *United States v. Seeger*, 380 U.S. 163, 170 (1965), for as Judge Wyzanski stated below:

When the state through its laws seeks to override reasonable moral commitments it makes a dangerously uncharacteristic choice. . . . When the law treats a reasonable, conscientious act as a crime it subverts its own power. It invites civil disobedience. It impairs the very habits which nourish and preserve the law.  
App. 33.

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<sup>4</sup> The Ninth Amendment support is elaborated in Appellee's Brief, pp. 97-102 and will not be specifically discussed here.

This right to obey the moral law is reflected in the First Amendment guarantee of religious liberty and is, indeed, implicit in our entire constitutional framework and origins. Although the "free exercise of religion" clause obviously refers explicitly only to religion,<sup>5</sup> it was obedience to conscience and morality that made this nation a haven for freedom-loving men everywhere. The history of our national origins is largely a history of religious dissenters and conscientious objectors like the Puritans, the Quakers, Roger Williams, the 1848 immigrants, and others. See Sibley, "Dissent: The Tradition and Its Implications," in Finn (ed.), *A Conflict of Loyalties*, 103-139 (1968). Numerous provisions of the Constitution are directly and indirectly designed to protect the dissenting conscience in various aspects of civic life. This is certainly true of the freedom of speech and press clauses, but it is equally true of the privilege against self-incrimination in the Fifth Amendment, as used for example by John Lilburn and others, see Griswold, *The Fifth Amendment Today*, 34, 8-9 (1955), the protection against unreasonable searches and seizures of the Fourth, see *Marcus v. Search Warrants*, 367 U.S. 717, 724-29 (1961). In short, by the same reasoning which supported the development of a right of privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965), it is not merely possible but appropriate to recognize a right of conscience against governmental compulsion to perform certain acts.

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<sup>5</sup> Because of the almost universally religious source of conscience in the 18th century, the moral conscience was virtually identical with religious conscience, and thus, protection for the latter virtually guaranteed full protection for the former. See generally Brodie and Sutherland, *Conscience, the Constitution and the Supreme Court: The Riddle of United States v. Seeger*, 1966 Wis. L.Rev. 306, 309.

The fact that the objection in question relates to a particular war does not make it any the less conscientious. As Judge Wyzanski noted, "a selective conscientious objector might reflect a more discriminating study of the problem, a more sensitive conscience and a deeper spiritual understanding." App. 29. Indeed, by far the greater number and larger bodies of all religions recognize the right of conscientious abstention from some wars but not others.\* The Catholic doctrine of the just war is well known, and is deeply rooted in St. Augustine and St. Thomas Aquinas. See *United States v. Bowen*, — F. Supp. — (N.D. Calif. Dec. 24, 1969), 38 U.S.L. Week 2361, n. 1. Various Protestant groups have asserted the right of selective opposition to unjust wars, see, e.g., Fourth Assembly of the World Council of Churches, N. Y. Times, July 17, 1968, at p. 1, col. 3; A Policy Statement of the National Council of Churches of Christ in the United States of America (Feb. 23, 1967). Jehovah's Witnesses believe in theocratic wars and in self-defense of their brethren and their Church, see, e.g., *Sicurella v. United States*, 348 U.S. 385 (1955); *Kretchet v. United States*, 284 F.2d 561 (9th Cir. 1960). Even Quaker doctrine seems to approve the use of force to maintain world peace, as can be seen from William Penn's charter for world government. See Sibley & Jacob, *Conscription of Conscience: 1940-47* 25 (1952). See also

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\* In *Noyd v. McNamara*, 267 F. Supp. 701 (D. Colo. 1967), *aff'd* 378 F.2d 538 (10th Cir.), *cert. denied* 389 U.S. 1022 (1967), the District Court allowed petitioner, a regular Air Force officer who had become a selective conscientious objector after eleven years of honorable service, to present extensive expert testimony by "distinguished theologians and philosophers," 267 F. Supp. at 705, on the history and religious significance of selective objection. Since such testimony is of relevance to the issues before this Court in this case, amici are reprinting, as an appendix to this brief, the digest of the expert theological testimony which was included on pp. 12-15 of the petition for certiorari in *Noyd v. McNamara*.



Gendler, "War and the Jewish Tradition," in Finn (ed.), *A Conflict of Loyalties*, 78-102 (1968). The fact is that almost every pacifist believes in the use of force for self-defense and police purposes at least.

As Chief Justice Hughes said in *United States v. MacIntosh*, 283 U.S. 605, 627 (1931) (dissent):

"There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression." 283 U.S. at 635.

**2. It is unconstitutionally discriminatory to deny the exemption to selective objectors when granting exemption to total objectors**

It is clearly discriminatory under *Sherbert v. Verner*, 374 U.S. 398 (1963) to grant a benefit to adherents of one religious belief while denying it to those of other beliefs, even where the impact is only indirect. "[I]f the purpose or effect of a law . . . is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect," 374 U.S. at 404, quoting *Braunfeld v. Brown*, 366 U.S. 599 (1961). If benefits are denied only to those whose religious practices and beliefs preclude them from being eligible therefor, an enormous burden falls on the proponents of such legislation to show "the gravest abuses, endangering paramount interests." 374 U.S. at 406-07.

Applying this to *Sisson*, it seems clear that if the state exempts from combat service those who refuse to fight in



a war because their religious belief induces them to oppose *all* wars, while denying it to those whose religious beliefs induce them to refuse to fight in that same war but because they religiously oppose only *some* wars, the state's action is "constitutionally invalid." It forces the latter to forego the exercise of his most profound religious beliefs (certainly as religious belief has been defined in *Seeger*), that it is perhaps moral and ethical to fight in a just war, but in no case in an unjust one.<sup>7</sup> To condition the exemption on the profession of a religious belief requiring total pacifism violates both the free exercise and establishment clauses of the First Amendment.

The burden of justifying such an encroachment is very heavy, indeed. *Sherbert v. Verner*, 374 U.S. at 406-07, MacGill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 Va. L.Rev. 1355, 1377-83 (1968). As is demonstrated below in Part IC, this burden has not been met. See also MacGill, 54 Va. L.Rev. at 1378-83.

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<sup>7</sup> Here one sees one of the most paradoxical aspects involved in denying exemption to the selective conscientious objector: the denial is based on the selective conscientious objector's expectation that he would indeed fight in a *hypothetical* moral war, but he abstains from the very same *actual* war that the total pacifist opposes. Indeed, it is unlikely that the selective conscientious objector will ever really have to participate in the hypothetically just war he has admitted willingness to fight in. It is his honesty with respect to a situation that he may well never face, that disqualifies him from the exemption for total pacifists. Cf. Segal, "Conscientious Objection and Moral Agency," in Finn (ed.), *A Conflict of Loyalties*, 263-283 (1968) ("We cannot know for sure that a time will not come when there will be a war which should be fought in order to prevent the destruction of all life," *id.* at 283). Appended to the essay of Mr. Segal is his own application for classification as a selective conscientious objector. *Id.* at 283-287.

This case of course involves more than a distinction among religious objectors, for Sisson is not "formally religious" in the statutory sense. But if it is impermissible to discriminate among religions by favoring a religious belief requiring total pacifism over a religious belief entailing selective objection, and if, as will be argued below and as was concluded by Judge Wyzanski, it is similarly illegitimate to favor religious believers over those with non-religious beliefs, then it is constitutionally irrelevant that the claim in this case is based on formally non-religious sources. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

In sum, if a total religious pacifist is granted an exemption, a selective religious pacifist must also be; and if a religious pacifist, total or selective, is entitled to an exemption, then a non-religious pacifist must also be. Once any exemption is granted for religious reasons, one cannot distinguish among different kinds of religious pacifisms (total or selective) or between any religious pacifism and a non-religious kind. There can be no discrimination in favor of either one religious conscience over another, or in favor of the religious conscience in general over the non-religious conscience.

### 3. *Balancing rights against needs*

As Judge Wyzanski noted, however, no such right of conscience is absolute, and a balancing process is necessary to determine the scope and limits of the right of conscientious objection. Compare, *Barenblatt v. United States*, 360 U.S. 109 (1959). It is here that the link with the due process clause also appears, for the issue is whether there is a rational basis or need for the infringement of the right, with a heavy weight in favor of the

right because of its First Amendment sources. Compare, *Sherbert v. Werner*, 374 U.S. at 406-07 ("the gravest abuses, endangering paramount interests").

Focusing on the narrowness of Sisson's claim, and on the absence of any countervailing claim of need, Judge Wyzanski concluded that no case had been made requiring Sisson to kill, contrary to the dictates of his conscience, in a foreign military campaign fought "for limited objects with no likelihood of a battlefield within this country and without a declaration of war . . ." App. 29. The court stressed the absence of "any suggestion that in present circumstances there is a national need for combat service from Sisson as distinguished from other forms of service by him." *Ibid.* The district court thus found that no case for national need had been made to override the claim of conscience, doing the same kind of "balancing by the courts of the competing private and public interests at stake in the particular circumstances shown," as this Court has done in other First Amendment contexts. See *Barenblatt*, 360 U.S. at 126. The court's judgment was based on no disputed issues of fact, and the Government has not challenged the merits of this finding but only whether any court may even consider such a claim. See Point IC1 of this brief below.

#### **4. Section 6(j) is consistent with selective conscientious objection**

Although the Government seems to deny any statutory support for a claim of selective conscientious objection both the statute and decisional law suggest the opposite.

Nothing contained in this title • • • shall be construed to require any person to be subject to combatant train-

ing and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. . . .

On its face, it is difficult to see why "in any form" necessarily modifies "war" and not "participation." If it modified "participation," it would quite significantly exempt from combat someone who refuses to serve in the military in any capacity, thus leaving open the possibility of compulsory non-military service. Indeed, if the phrase "in any form" is intended to exclude selective objection, it is a quite inartful expression, for surely "all wars" or "any war" would more clearly express that conception.

Equally important, a number of cases have allowed the claim of selective opposition to war.

In *Sicurella v. United States*, 348 U.S. 385 (1955) this Court held that a Jehovah's Witness, who believed in the use of force to defend his "ministry, Kingdom Interests and . . . his fellow brethren," 348 U.S. at 388, though not himself, and would fight in a war at God's request, though apparently only with spiritual weapons, was entitled to conscientious objector status. Two Justices dissented, claiming that the defendant was being allowed to choose the wars he would fight in. In accord with this decision, the lower federal courts have granted Jehovah's Witnesses such exemptions in a long series of cases, even where the Witness was willing to slay men at Jehovah's request. See, *Kretchet v. United States*, 284 F.2d 561 (9th Cir. 1961);

*Shepherd v. United States*, 217 F.2d 942 (9th Cir. 1954); *Bouziden v. United States*, 251 F.2d 728 (10th Cir.), cert. denied, 356 U.S. 927 (1958); *Mayfield v. United States*, 220 F.2d 729 (5th Cir. 1955); *United States v. Pekarski*, 207 F.2d 930 (2nd Cir. 1953). Although the Court in *Sicurella* stressed that such orders had not yet come from Jehovah and were unlikely to, all these defendants appeared willing to use force in defense of their Church or their brethren, but not aggressively, just as petitioner expressed willingness to use force in defense of his country but not aggressively.

In addition, the decision in *Fleming v. United States*, 344 F.2d 912 (10th Cir. 1965), seems to have granted an exemption to one who believed that some wars are permitted. Though he thought "love and positive forces" would usually be effective to eliminate war, he added that "force should be used only as a final alternative and under fair circumstances." 344 F.2d at 914. Expressly adverting to defense of country, the defendant in *Fleming* stated that "self-defense of a people would not involve war—but protection against a smaller group which could not be reconciled by intelligence and positive forces." *Ibid.*

More explicitly and directly relevant hereto, the recent decision in *United States v. Bowen*, — F. Supp. —, Cr. No. 42499 (N.D. Calif., Dec. 24, 1969), 38 U.S. L. Week 2361, acquitted a selective conscientious objector, holding that discrimination against selective objectors was a violation of the Equal Protection Clause. Judge Weigel held: "... it is clear that there is no compelling governmental interest for distinguishing the defendant, who is opposed to participation in the Vietnam War on religious grounds, from others who are religiously opposed to all wars." 38 U.S. L. Week at 2362. See also *Noyd v. McNamara*, 296 F.



Supp. 136, 137 (D. Colo. Mar. 29, 1967) (granting preliminary injunction against assignment of Air Force officer to any duties which would be in violation of his selective conscientious objection) where Judge Doyle cited *United States v. Seeger, supra*, and *Sicurella v. United States, supra*, and held:

"Although it doesn't deal specifically with whether one can be a conscientious objector in a limited way, it does indicate that there are no particular limitations upon holding these conscientious views in terms of the nature or character of the religion or the philosophy which moves him to adopt such views" 296 F. Supp. at 137.\*

On the other hand, some cases have held or seemed to hold that the phrase "participation in war in any form" precludes an exemption for selective objectors. The decision most often cited for this proposition is *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943). In it Judge Augustus N. Hand said that an exemptible conscientious objection "must *ex vi termini* be a general scruple against 'participation in war in any form' and not merely an objection to participation in this particular war[.]" 133 F.2d at 707. But the significant fact about *Kauten* is that the defendant there was an objector to *all* wars; the defect in his application for exemption was held to be that his objection was not religious. The foregoing dictum reflected only a suggestion—also not necessary to the decision—that the non-

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\* The District Court subsequently dismissed the complaint for lack of jurisdiction, 267 F. Supp. 701 (D. Colo. 1967), reiterating that "We do not reach the merits of plaintiff's case and hence we do not deny his sincerity or reject his particular basis for claiming that he is a conscientious objector," *id.* at 708; *aff'd* 378 F.2d 538 (10th Cir. 1967); *cert. denied* 389 U.S. 1022 (1967).

universal pacifist will be less likely to be a religious one. That suggestion seems doubtful in the light of the analysis by theologians now available (see pp. 29, 32-33, *infra*, and Appendix). While the *Kauten* holding—that a non-religious total pacifist cannot qualify—may have been good law in 1943 it can scarcely be accepted as such today. See Part II, below. In all events, the comment on exempting objectors to “this particular war,” since the question was not before that court, scarcely merits the weight as authority which *Kauten*’s numerous citations have appeared to give it. Cf. *United States ex rel. Phillips v. Downer*, 135 F.2d 521, 524 (2d Cir. 1943).

*United States v. Kurki*, 255 F. Supp. 161 (E.D. Wisc. 1966) *aff’d on other grounds*, 384 F.2d 905 (7th Cir. 1967), *cert. denied*, 390 U.S. 926 (1968) held that the words, “in any form,” modify “war,” precluding exemption of selective objectors. This lone holding was decided on a hurriedly submitted motion, made after the defendant had changed attorneys and the theory of his defense. See 255 F. Supp. at 163.

The contrary position however was taken by the Eighth, Seventh, and Second Circuits. See *Taffs v. United States*, 208 F.2d 329, 331 (8th Cir. 1953), *cert. denied*, 347 U.S. 928 (1954); *United States v. Hartman*, 209 F.2d 366, 371 (2d Cir. 1954); *United States v. Close*, 215 F.2d 439, 442 (7th Cir. 1954), *cert. denied*, 348 U.S. 970 (1955).

Thus, in *Taffs*, the Court declared that

“The words, ‘in any form’, obviously relate, not to ‘war’ but to ‘participation in’ war. War, generally speaking, has only one form, a clash of opposing forces. But a person’s participation therein may be in a variety of forms. He may be carrying a rifle, piloting a plane,

working in a clerical staff behind the lines, or working in a defense plant on the home front. We think Congress intended by this section to exempt those persons from serving in the armed forces whose religious beliefs were opposed to any form of participation in a flesh and blood war between nations." 208 F.2d at 331.

Regardless of whether this case involved Jehovah's Witnesses and theocratic wars, the Court's interpretation of the modifying clause is appropriate to all cases.

*Seeger's* citation to the *Macintosh* dissent lends some further support to this reading. The *Seeger* case first cited that dissent as "enunciat[ing] the long recognition of conscientious objection," and quoted Chief Justice Hughes' eloquent defense of the right of conscience, a *defense made on behalf of a selective objector*. Moreover, other key quotations and citations in *Seeger*, see 380 U.S. at 170, are in the same paragraph as that in which Chief Justice Hughes declared that "Professor Macintosh, when pressed by the inquiries put to him, stated what is axiomatic in religious doctrine." 283 U.S. at 634. These statements by Professor Macintosh were manifestly a profession of selective opposition. See 283 U.S. at 617-19. Surely the adoption of the rationale of the *Macintosh* dissent by both the *Seeger* court and by Congress, see 380 U.S. at 170, impliedly adopted its application to the very situation in which that rationale was first enunciated—selective opposition based on conscience.

Indeed, this recognition of selective objection is in harmony with the legislative intent. The legislative purpose in enacting the exemption of conscientious objectors was twofold: the preservation of religious liberty and the pre-

vention of disruption within the armed forces. An interpretation of the statute to encompass Sisson's beliefs is consistent with both of these purposes; neither goal is advanced by distinguishing between the two forms of conscientious objection.

### (1) Preservation of religious liberty

The primary reason for the exemption is acknowledged to be the protection of individual conscience. Congress was giving expression to this country's deep-rooted concern for religious liberty. In particular, this recognition of the claims of conscience and protection of the rights of conscientious objectors traces itself back to the origins of our history in colonial times. Selective Service System, 1 *Conscientious Objection* (Special Monograph No. 11, 1950). As this Court recognized in *Seeger*, the fundamental objective of Congress in exempting conscientious objectors from military service has been to avoid government compulsion of actions contrary to religious beliefs, either by induction into the service contrary to conscience or by imprisonment for refusal to serve:

"Chief Justice Hughes, in his opinion in *United States v. Macintosh*, 283 U.S. 605 (1931), enunciated the rationale behind the long recognition of conscientious objection to participation in war accorded by Congress in our various conscription laws when he declared that 'in the forum of conscience, duty to a moral power higher than the State has always been maintained.' At 633 (dissenting opinion). In a similar vein Harlan Fiske Stone, later Chief Justice, drew from the Nation's past when he declared that 'both morals and

sound policy require that the state should not violate the conscience of the individual. . . ." *United States v. Seeger*, 380 U.S. 163, 169-170 (1965)

This purpose was emphasized throughout the congressional hearings before the House Military Affairs Committee on the Selective Training and Service Bill between July 10 and August 2, 1940:

"Mr. Sparkman: You are not asking recognition for just your group, but you are asking us to recognize that there is such a thing as an individual conscience?"

"Mr. Horst: Yes, sir.

"Mr. Sparkman: And the individual conscience is to be respected so long as it is sincere?"

"Mr. Horst: That is the way we feel about it.

"Mr. Sparkman: And that is the traditional thing in our history, is it not, and our country's handling of affairs in the past?"

"Mr. Horst: I think so. . . ." *National Service Board of Religious Objectors, Congress Looks at the Conscientious Objector* 10 (1943)

Shortly thereafter the Chairman (Rep. Andrew J. May, Kentucky) pointed out:

I think the preservation of conscience is a very important thing, and freedom of conscience is a very important thing. That is one foundation upon which our structure of government is built. . . . (*Id.* at 10).

This protection sought for religious liberty and conscience applies no less forcefully to those whose scruples



dictate that they abstain from the present war, than it does to those opposed to all wars. The discriminating religious objector follows a tradition recognized by Christians for more than 1,500 years, when he undertakes to assess whether a conflict is a "just war." St. Augustine, *City of God*, Book XIX, ch. 7 (Image Books ed., 1958); *Deliverance on Rights and Responsibilities of Public Dissent*, *Social Deliverances of the 178th General Assembly of the United Presbyterian Church U. S. A.*, Social Progress, July-August, 1966, 26-30, especially 28; see also, R. Bainton, *Christian Attitudes Toward War and Peace*, (1960) *passim*, (tracing the concept of the just war back to the Old Testament, and classical and early Christian thinking which influenced St. Augustine); Finn, *A Conflict of Loyalties*, (1968) *passim*; see generally, Hochstadt, *The Right to Exemption from Military Service of a Conscientious Objector to a Particular War*, 3 Harv. Civil Rights-Civil Liberties L.Rev. 1, 10-15 (1967).

## (2) Preventing disruption of the armed forces

The second reason for the exemption has been that the induction or retention of objectors in the services would cause intolerable disruption. During the House Military Affairs Committee hearings, Congressman Faddis emphasized this as the other purpose underlying the exemption:

And, secondly, I am sure if I were to go out and command the troops—and I may—I don't want any conscientious objectors in my regiment at all. I would rather they would be some place else. They would be more bother than they would be worth, and a bad example to other men. You could not do anything with them in the way of soldiers and somebody would have to be doing the fighting in a war and I am sure no

man who would command the troops would want them. National Service Board of Religious Objectors, *Congress Looks at the Conscientious Objector* 12 (1943).

Yet this is the case as much for discriminating objectors as for universal pacifists. There is no reason to assume that discriminating objectors will be any more amenable to compulsion or any less influential upon the morale of other men than universal pacifists.

Thus, neither of the two legislative purposes in establishing the exemption justifies a distinction between the universal pacifist and the discriminating religious objector to war; indeed, recognizing the selective conscientious claim is consistent with those purposes.

**C. Recognizing a Selective Conscientious Objector's Exemption From Combat Duty in the Vietnam War Does Not (1) Raise a Political Question; (2) Impugn the Integrity of the Democratic Process or Justify Civil Disobedience; or (3) Interfere With Military Efficiency**

**1. No political question unfit for judicial resolution is involved**

The Government seeks to transform this well-established due process and First Amendment balancing into something quite different. The Government would have this Court believe that the district court was passing on whether "a particular law or particular foreign policy is good or bad, or whether there is or is not any need for specified numbers of men in a particular place at a certain time." Brief 40. Citing a string of decisions indicating the limits of judicial power in the area of foreign affairs, the Brief characterizes the court below as seeking to pass on

"whether the United States does or does not need to take into the Armed Forces men who do not agree with its foreign policy of the moment." Brief 41.

This description grossly distorts the opinion below. Judge Wyzanski was deciding not whether we need 300,000 or 400,000 combat troops in Vietnam, or whether the March, 1969 quota required drafting dissenters, but a much narrower question, which is quite appropriate for judicial consideration: whether a right of conscience and ultimately to life itself can be overridden when there is no showing or even claim of any need therefor. In determining need, the district court did not have to examine complex data or make political judgments but relied on two facts only: the lack of either a declaration of war or of a threat to the homeland, both of which facts are totally undisputed and indeed a matter of public record. This is precisely the kind of balancing this Court has consistently undertaken where constitutional rights are concerned, see, *e.g.*, the clear and present danger test of *Dennis v. United States*, 341 U.S. 494 (1951); and *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and the aforementioned balancing tests of *Barenblatt* and of *Sherbert v. Verner*. Indeed, the Government itself has heretofore supported such an approach in the speech area. The district court had to do less of a factual analysis of needs and threats than has been done in the aforementioned situations, for Judge Wyzanski relies solely on the two undisputed facts noted.

Invoking the talismanic label "political question" does not decide this issue either. In *Baker v. Carr*, 369 U.S. 186, 217 (1962), this Court declared that it would find a "political question" when there exists

"... a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Under these criteria, the balancing issue herein is quite justiciable: there is no textually demonstrable commitment of this issue to the other branches; there are well-established judicial approaches for resolving the question in *Barenblatt*, *Dennis*, *Brandenburg*, and *Sherbert*, *supra*; there is no danger of multiple and conflicting governmental pronouncements; no extended weighing of political or economic factors is involved nor is there a need for access to a mass of secret or technical data; there is no head-on collision with purely administrative or executive decision, and there is no unusual need for adherence to a political decision.

This conclusion is further supported by a consideration of the issues involved in the authorities cited by the Government, which are treated in the margin.\*

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\* *Pauling v. McNamara*, 331 F.2d 796, 799 (D.C. Cir. 1963), *cert. denied*, 84 S. Ct. 1336 (1964), involved an attempt to have the courts enjoin nuclear testing; *Ludecke v. Watkins*, 335 U.S. 160 (1948), involved review of an existing Executive determination of when a war was ending.

Courts have both the competence and the duty to determine whether the most fundamental rights of liberty and life can be overridden where no showing of need therefor is made or even attempted. The executive and legislative branches have not been freed from the obligation to act responsibly when they invade the highest of human interests—life and conscience. In short, the Congressional power to raise armies is not exempt from the Constitution.

***2. The democratic process is not impugned by allowing selective conscientious objection nor is civil disobedience legalized***

The Government argues, however, that allowing selective objection impugns the democratic process because it justifies an exemption from civic obligation on the grounds of political dissent; further, that such an exemption allows exemption from all other obligations and in effect permits civil disobedience.

Such fears are unwarranted. In the first place, this decision deals explicitly only with *combat* duty. Surely, the difference in magnitude between compulsory killing under penalty of death, and other forms of service, is sufficiently great that a special exemption for the former implies nothing as to the latter or to civil disobedience in general. We do not deal either with volunteered obstruction or compulsory tax payments or even compulsory open housing. Rather, we deal with a conscientious objection to having to kill or be killed, a case so obviously special—as is everything involving death—that it serves as a weak precedent indeed for other forms of dissent. When the government “orders citizens to kill or die, it comes close to the limits



that even Hobbes put down around the authority of the Leviathan." Christian Bay, quoted in Kaufman, "The Selective Service System: Actualities and Alternatives" in Finn (ed.), *A Conflict of Loyalties*, 240, 252 (1968).

In support of its contention that recognition of selective conscientious objection should be rejected because of the "traditional application of the 'political question' doctrine," Brief, page 49, the Government cites the policy reasons given by a majority of the Marshall Commission in its 1967 report, National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?*, pp. 48-51. It is interesting to note, however, that the Government does not cite a single other commentator or writer who supports this position. The fact is, that the overwhelming majority of distinguished writers, scholars and theologians who have considered the subject have strongly endorsed the wisdom of and advocated recognition of selective conscientious objection, and have vigorously criticized the reasoning and conclusions of the Marshall Commission majority. This is true of most of the contributors to the most recent book which has been published on this subject, Finn (ed.), *A Conflict of Loyalties* (1968). See particularly the essays by the late Father John Courtney Murray, one of the Marshall Commission minority; see, also, Quade, "Selective Conscientious Objection and Political Obligation," Finn, *supra*, at 195, 205-211; Harrington, "Politics, Morality and Selective Dissent," Finn, *supra*, at 219, 224-226; and Kaufman, "The Selective Service System: Actualities and Alternatives," Finn, *supra*, at 240, 244-254. Professor Kaufman concludes: "Many parts of the Commission's report are excellent; most of the reasoning is sound. But in their discussion of selective conscientious

objection, the Commission's majority seemed to become tools of higher political powers." *Id.*, at 254.

To put it another way, the opinion of the court below did not permit the selective conscientious objector completely to avoid supporting his community's policy; it allowed him only an exemption from supporting it in a particular way—by killing. Thus the court stressed that it was not ruling on the requirement of wartime or peacetime conscription, or even of conscription in the military, but only with the obligation to kill on pain of being killed. The court's ruling does involve some dispensation from total acquiescence in a political decision, and does recognize a citizen's right to interpose his moral judgment upon the state's political decisions, in a very narrow but crucial area. But surely a great nation, confident of its power and its cause, can tolerate something less than total acquiescence when there is no demonstrable harm to efficiency or to any other substantial interest and especially when that small dispensation is in the name of conscience. Great Britain managed it quite easily in its darkest hour, see *infra*, p. 34, and a nation conceived in liberty and conscience can do just as well in a conflict which in no way jeopardizes its security.

It is for this reason that the Government's citation, at page 45 of its brief, to Mr. Justice Cardozo's concurrence in *Hamilton v. Regents*, 293 U.S. 245, 268 (1934) is misleading. Of course, "extension of the conscientious objector's liberty *might* lead to wholly incongruous situations" (emphasis added). It all depends, however, on the nature and magnitude of the extension. In *Hamilton*, a group of religious students unsuccessfully sought exemption on con-

scientious grounds from compulsory participation in a college ROTC program. Focusing on the very marginal involvement with the military that such courses entailed, Mr. Justice Cardozo first stressed that

The petitioners have not been required to bear arms for any hostile purpose, offensive or defensive, either now or in the future. They have not even been required in any absolute or peremptory way to join in courses of instruction that will fit them to bear arms. (293 U.S. at 265-66.)

It was only on ~~this~~ background and claim, totally unlike Sisson's who is being subject to bearing arms, that Justice Cardozo then concluded by warning against the dangers [i]f his [the conscientious objector's] liberties were to be *thus* extended . . . " 293 U.S. at 268. (Emphasis added.)

This case is unique in another way: it involves combat in an undeclared war where the democratic process has not in fact followed its usual course before constitutionally committing men to kill. The importance of a declaration was noted in the *Selective Draft Law Cases*, 245 U.S. 366, 389-90 (1918), when the Court rejected the claim of involuntary servitude where defense of the nation was required "in a war declared by the great representative body of the people."

Finally, the fact that Sisson's conscience involved the "political" is no reason to deny it sanction. The most religiously sensitive conscience will make so-called "political" judgments, when it passes on political affairs. See, e.g., the works of Martin Buber, Reinhold Niebuhr, Paul Tillich, the Gospels and the Talmud. Unless conscience is to ab-

dicating its responsibilities where public matters are concerned—a position espoused by no religious or other ethic—"political" judgments are necessarily involved. Indeed, does not the total pacifist's objection to participating in any military service necessarily entail "political" decision-making about the nature of war since total pacifism is consistent with personal self-defense? This does not mean that all political questions are moral or vice versa, but unless the words "political" or "moral" are to lose all independent meaning, unless the words "power" and "conscience" have lost all independent significance, moral decisions are different from political decisions and it is only the former which demand recognition.

Obviously, amici are not urging that there is a constitutional right to be exempt from military service in a particular war for one whose objection to that war is based on the fact that it is opposed by his political party; or whose objection is based on his view that it will improve foreign trade with a neutral power; or whose objection is posited on a favoring of certain political or economic or cultural conditions in the country with which we are at war over our own. These are clearly political objections. On the other hand, when Dr. Reinhold Niebuhr and his colleagues at Union Theological Seminary, who joined with him in founding "Christianity and Crisis" at the outbreak of World War II, departed from the traditional pacifism of American Protestantism, and concluded that World War II was a just war, this was surely a combined political and religious judgment. The same is true for the late Fr. John Courtney Murray, a vigorous advocate of selective conscientious objection, who, until his death, supported the Vietnam War. See Murray, "War and Conscience" in Finn

(ed.), *A Conflict of Loyalties*, 19-30 (1968). ("I can just about make the moral case. But so it always is. The morality of war can never be more than marginal . . . . Moral judgment on the issue must be reached by a balance of many factors." *Id.* at 23.) And it is conversely and equally true for the men of conscience, including theologians and selective service registrants, who have come to a combined religious and political judgment that they are selective objectors to the present war.

The proper question is whether, as Judge Wyzanski put it, the *source* of the decision "is moral and ethical . . . reflect[ing] quite as real, persuasive, durable and commendable a marshalling of priorities as a formal religion." App. 22. Indeed, except for Sisson's own perhaps uninformed and ill advised conclusion that his objection was "not religious," cf. *United States v. Schacter*, 293 F. Supp. 1057 (D. Md. 1968) (holding professed atheist entitled to conscientious objector status) his and similar moral views would easily fit within the *Seeger* definition of religion: "a belief [which] occup[ies] the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption." 380 U.S. at 184. Compare *Seeger*'s own statement of his views, described and discussed in the Court of Appeals' opinion in *Seeger*, 326 F.2d 846, 848 (2d Cir. 1964).

**3. Allowing selective conscientious objection will not destroy morale or impair efficiency**

It is argued, with more fervor than facts, that allowing selective conscientious objection is unfair, and destructive of both morale and efficiency. Since the prevailing inter-



pretation of the statute has thus far not permitted recognition of selective conscientious objection—assuming that all who have qualified for exemption under §6(j) are “total” objectors—there is little evidence to go on. Because the supreme values of conscience, life and liberty are concerned, a very heavy burden lies on those who seek to infringe such rights, and in the absence of evidence, they should not prevail.

Furthermore, the available evidence contradicts such a claim. Great Britain, during World War II, permitted selective conscientious objection on grounds of conscience alone, without a religious test. See Hayes, *The Challenge of Conscience* (1947). A negligible number sought, and even fewer gained, exemption. See MacGill, 54 Va. L.Rev. at 1381 n. 101; Note, 34 U. Chi. L.Rev. 79, 89, 103-04 (1966). This is probably because the way of the conscientious objector, and particularly of the selective conscientious objector, is hard indeed,<sup>10</sup> see Sibley & Jacob, 315-19, 459-64. Understandably, few seek it, especially in a nation which does not cheerfully tolerate active dissent in times of international crisis. “This is borne out by the experience of the American Civil Liberties Union that notwithstanding its stated readiness to accept selective conscientious objector cases for almost three years, only a handful of men have come forward.” Book Review, New York Times, Nov. 2, 1969, pp. 10, 12. The *Seeger* case itself resulted in relatively few additional exemptions, though that may have been because of the hostility thereto of local boards, a hos-

---

<sup>10</sup> e. e. cummings’ poem “i sing of olaf strong and brave” is a particularly vivid rendering of the treatment once—and perhaps still—afforded conscientious objectors.

tility, however, which will not be appreciably less for selective objectors. See MacGill, 54 Va. L.Rev. at 1380, n. 78. And under the opinion below, alternate service remains so that no unfair increase in comfort for the objector is involved.

There is also no indication that there are unusually severe administrative problems. See MacGill, 54 Va. L. Rev. at 1380-81; Note, 34 U. Chi. L.Rev. at 104-05. And it is equally difficult to believe there will be any impairment of morale if a few conscientious objectors have to perform duties which many civilians and even soldiers perform anyway.

Practical considerations actually cut for the exemption not against. No conscientious objector, whether selective or total, is likely to make a good soldier. Since alternate service is required under the opinion below, it seems a flagrant waste of highly trained and scarce resources to force someone who will perform such alternate service, not infrequently a person of high intellectual and moral caliber, to go to jail in order not to violate his conscience. Cf. *United States v. Macintosh*, 283 U.S. at 629. It seems especially wasteful since it is clear that in this area compulsion simply does not work—it merely puts a substantial number of people behind bars and fails either to deter or to make use of the true conscientious objector. Sibley & Jacob, 475-78.

In contrast to the purely speculative nature of the harm in allowing the claim of conscience, the great harm to both the individual and to the community if the conscience is ignored is plain. We live today in a world where man's destructive skills have far outdistanced his meager peace-

making wisdom, where frustration, cruelty, and arrogant power often drown out the still small voice of conscience. In such a world, we should not readily override a sincerely conscientious objection to killing. As the poet Karl Shapiro has reminded us in his poem "The Conscientious Objector,"

" . . . Your conscience  
Is what we come back to in the armistice."

## II.

### **CONGRESS CANNOT CONSTITUTIONALLY GRANT EXEMPTION TO THE RELIGIOUS CONSCIENCE AND DENY IT TO THE NON-RELIGIOUS.**

The Government contends that the issue of nonreligious objection is not in this case, although it relies on the non-religious nature of Sisson's claim to deny any arbitrary discrimination. See Government Brief 45-46. Its argument is that because Sisson's objection is selective, he is ineligible anyway. Yet, if the selectivity is not a disqualification, as Judge Wyzanski concluded, then it would seem necessary to consider the other possible ground of disqualification—the nonreligious character of Sisson's objection. On this issue, amici urge:

(1) The statutory definition unconstitutionally favors religiously conscientious objectors over nonreligious objectors, and therefore constitutes an unconstitutional establishment of religion.

(2) The statutory standard "by reason of religious training and belief" operating in a nation that has several

hundred denominational concepts of the meaning of religion, and uncounted non-denominational ones, has proven to be so vague as to be unworkable, confusing and subject to arbitrary application and it inevitably produces unfair discrimination among registrants.<sup>11</sup>

**1. It Is an Unconstitutional Establishment of Religion to Discriminate Against Non-Believers**

Constitutional neutrality with respect to believers and non-believers requires that no special rights be given to the believers, regardless of whether such benefits be constitutionally required or legislatively granted. *Torcaso v. Watkins*, 367 U.S. 488 (1961). Cf. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

Relying on this constitutional principle Judge Wyzanski briefly observed what would seem self evident:

... [I]t is difficult to imagine any ground for a statutory distinction except religious prejudice. In short, in the draft act Congress unconstitutionally discriminated against atheists, agnostics, and men, like Sisson, who, whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings. App. 35.

It is indeed difficult to see a basis for such a distinction. As Edward L. Ericson, President of the American Ethical Union, has said:

<sup>11</sup> Parenthetically, we would note that Sisson's views may actually fit the *Seeger* definition of religion, but since he apparently did not urge this, amici do not either.

"The notion that the conscience of the 'orthodox' believer in God is grounded upon a firmer and more compelling imperative than the conscience of the humanist or the freethinker is itself a theological judgment that a secular constitutional democracy such as the United States has no right to make. A state that makes such distinctions is already doing theology and therefore clearly transgressing the nonestablishment clause of the first amendment. Whether religionists have better or more impelling consciences than those who make no claim to be religious is an issue that philosophers and theologians—and plain people—should be free to debate, but on which it is unconscionable for the state to legislate. For to do so is for government to obstruct the open encounter of conflicting opinion that Milton and Jefferson saw as the necessary condition of liberty and moral progress." Ericson, "Humanist Conscientious Objection" *Humanist* (May/June 1969).

Nor is there any particular administrative difficulty involved. As Judge Wyzanski observed "[t]he suggestion that courts cannot tell a sincere from an insincere conscientious objector underestimates what the judicial process performs every day," App. 31, and this applies to local boards as well. Courts and boards have consistently ruled on the sincerity of religious objectors and they can do the same with the non-religious as well. After all, the religiosity of the conviction does not control its sincerity. Indeed, in a skeptical age, those who question established and other religions and beliefs are often among the most sincere. Cf., *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943).



## 2. The Inherent Imprecision of the Statutory Standard Raises Difficulties of Constitutional Dimension

If not always true, certainly in an age of skepticism and of changing and expanding concepts of the meaning of religion, a statutory standard that requires a showing of "religious training and belief" necessarily invites varying and inequitable interpretations. The 1948 Act's attempt to add precision, by a definition that required "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation," created constitutional difficulties of another dimension. *United States v. Seeger*, 326 F.2d 846 (2d Cir. 1964), *aff'd*, 380 U.S. 163 (1965). While this Court's construction of that definitional language in *Seeger* sought to obviate those constitutional difficulties, the inherent imprecision remained.<sup>12</sup>

The Marshall Commission and others have found that a great many boards totally ignored the *Seeger* interpretation while many others grossly and wrongly narrowed it. For a summary of such findings see MacGill, 54 Va. L. Rev. at 1380-81; a very recent law review note found that courts had similarly misapplied it, though not nearly with so much hostility. See Note, Religious and Conscientious Objection, 21 Stan. L. Rev. 1734 (1969). There is thus a significant constitutional question whether Congress can enact a law which grants such vast administrative discretion to lay, nonexpert bodies like local boards, with so little meaningful guidance that the results are inevitably inequitable and discriminatory. See, *Keyishian v. Board of Regents*, 385

<sup>12</sup> Indeed, the lack of evenhandedness of the application of this and other sections of the draft law has been a greater impediment to national morale, than granting an exemption for selective objectors is ever likely to be.

U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961).

The interests at stake are so weighty, the problems of defining religion for these purposes are so great, and the actual administration of the standard so poor, that both constitutional imperatives and sound policy call for its abandonment. Since, as noted above, there is a constitutional right to a conscientious objection, this Court should abandon the requirement of a religious source and allow all conscientious objectors freedom from having to kill against the dictates of their conscience.

### CONCLUSION

For all these reasons, the decision below should be affirmed.

Respectfully submitted,

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January 16, 1970

## APPENDIX

Excerpt from pp. 1205 of the petition for certification  
 N. J. McVernon, O.J. 1967 No. 722 paragraph second  
 BY U.S. 1967

These "distinguished theologians and philosophers" 267  
 of 1967 at 1967 App. 112 were qualified as expert witnesses  
 and are cited on behalf of petitioners. They were:

Dr. Paul Auer, Professor of Philosophy at the State  
 University at New York at Buffalo, Chairman of the  
 Editorial Board of *The Humanist* (the national publication  
 of the American Humanist Association), author of  
*Democracy and the Conclusion of Man's Diversity* at  
 Washington Press, 1965, and several other books and  
 articles. **APPENDIX** collection of essays by  
 these theologians and philosophers being published  
 by Beacon Hill this year.

Dr. Robert C. Amball, Professor of Theology at the  
 First Unitarian School for the Ministry at Berkeley, California,  
 Unitarian and Congregational Minister, former  
 lecturer at Harvard Divinity School, author of  
*Philosophy of Religion* (Oxford University Press, New  
 York 1967), and *Library Extension of the Ethics of*  
*Paul Tillich*.

Dr. Robert M. Brainer, Professor of Religion at  
 Stanford University, formerly Professor of Religion  
 at the University of Chicago, author of *The Spirit*  
*of the World* (Oxford University Press 1964) and  
*World and World* (S.D.) *An American Dialogue*  
 in many other books, works of the editorial

U.S. AIR MAIL - Registered Mail - 977 U.S. 500 (1964)  
Postage & Fees Paid by Addressee - 388 (1964)

The interests at stake are so weighty, the problems of religious freedom for these purposes are so great, and the national cooperation is so indispensable, that both the moral imperatives and sound policy call for a unanimous decision. Such, as noted above, there is a consensus of opinion from the religious community, the Court should uphold the requirement of a religious source for the appointment of judges. The objections are not from having to follow the dictates of their conscience.

## CONCLUSION

APPENDIX

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First Pacific Bureau  
Buffalo, New York 14202

1945, *Annals of the American  
New York, New York 1949*

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Memorandum for David Curran

## APPENDIX

Excerpts from pp. 12-15 of the petition for certiorari in *Noyd v. McNamara*, O.T. 1967 No. 722 (certiorari denied, 389 U.S. 1022):

Three "distinguished theologians and philosophers," 267 F. Supp. at 705, App. 11a, were qualified as expert witnesses and testified on behalf of petitioner. They were:

*Dr. Paul Kurtz*, Professor of Philosophy at the State University of New York at Buffalo, Chairman of the editorial board of *The Humanist* (the periodical publication of American Humanist Association), author of *Decision and the Condition of Man* (University of Washington Press, 1965), and several other books, and editor of *Humanist Ethics* (a collection of essays by leading theologians and philosophers being published by Prentice Hall this year).

*Dr. Robert C. Kimball*, Professor of Theology at the Starr King School for the Ministry at Berkeley, California, Unitarian and Congregational Minister, formerly lecturer at Harvard Divinity School, editor of *Theology of Culture* (Oxford University Press, New York 1959), and Literary Executor of the Estate of Paul Tillich.

*Dr. Robert McAfee Brown*, Professor of Religion at Stanford University, formerly Professor of Religion at Union Theological Seminary, author of *The Spirit of Protestantism* (Oxford University Press 1961) and (with Gustave Weigal, S.J.) *An American Dialogue* (Doubleday), and other books, member of the editorial



boards of *Christianity and Crisis* and *The Journal of Ecumenical Studies*, holder of honorary doctorates from Notre Dame, Boston University, Loyola, University of San Francisco, Amherst and Lewis and Clark University, and official observer for the World Alliance of Reformed and Presbyterian Churches to the Second Vatican Council.

Each expert witness testified, with respect to the facts of this case, from personal familiarity with the petitioner's applications and from personal interviews with Captain Noyd which were arranged for the purpose of the expert being called a witness in this case.

Dr. Kurtz testified that Religious Humanism is rooted in the deepest traditions of the West, in the humanism prevalent in the Christian religion, and in such other major religions as Buddhism and Confucianism (R. 494). Petitioner's applications, he testified, and the background and beliefs expressed in his total position, identify him as a genuine participant in this religious tradition (R. 597).

Dr. Kimball described the meaning of religion, as it is captured in Tillich's dictum that that which is a man's ultimate concern is God for him (R. 508). The evidence that petitioner's conscientious objections are religious, he stated, are to be found both in his sincerity and in his courage, the two being central to the Tillichian concept (*vide*, Tillich, *The Courage to Be*) (R. 512).

Dr. Brown testified that what is or is not religious might properly be tested in terms of the root of the word "religion" (Latin: *religare*, to bind fast) from which it may be defined as "that to which one binds himself" (R. 526):

Religion is found, not just in what one says—in rituals and creeds—but in the degree of congruence between expressed statements of belief and what one does with his life. Dr. Brown found a commitment authenticating his words in petitioner's life and deeds which led him to conclude that his position is clearly based on religious training and belief (R. 527, 546).

On the subject of the religious man's participation in war, Dr. Brown identified several separate strains or traditions of religious thought within Western religions (R. 543 et seq.). He pointed out that these traditions sometimes cut across denominational or sectarian lines; for instance, the Jehovah's Witnesses partake of both the "pacifist" and the "crusade" traditions which are, in a sense, the opposite extremes of the total spectrum of views presented by these peace-war traditions (R. 545).

Dr. Brown emphasized the number of modern religious leaders and denominational bodies which had expressed themselves on the import of religious teachings for the religious man's participation in war. He pointed out, for instance, that the most recent pronouncements of Pope Paul VI approach the verge of describing the very war to which petitioner objects in conscience as an unjust war, and he described the commitment of the Catholic Church and of several American Protestant denominations to support the conscience of those who find that they cannot participate in war or in a particular war (R. 536 to 537, 539 to 542).

All three expert witnesses testified that the differences between universal pacifism and discriminating pacifism, religiously, is confined to the content of their religious beliefs. It does not extend to their religious quality. Both

are equally religious, in every sense of the word; neither is more "political" than the other. Neither can be said to belong to a more ancient or venerable religious tradition than the other. Dr. Kimball pointed out that both the universal pacifist and the discriminating objector have general principles which each must apply discriminately, in particular circumstances. (The universal pacifist, for instance, must discriminate among various of his individual actions, such as paying taxes, in terms of whether they amount to participation in war. R. 517.) Dr. Brown stated that, if the law were to exempt universal pacifists while denying exemption to discriminating ones, it would discriminate religiously—by *content* of belief—against some religious views and in favor of others (R. 542 to 543).







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JAN 29 1970

JOHN F. DAVIS, CLERK

**In the Supreme Court of the United States**

**OCTOBER TERM 1969.**

**No. 305.**

**UNITED STATES,**

*Petitioner,*

**v.**

**JOHN SISSON,**

*Respondent.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT,  
FOR THE DISTRICT OF MASSACHUSETTS.**

**BRIEF FOR AMICUS CURIAE PRO SE.**

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**2825 E. 130 Street,**  
**Cleveland, Ohio 44120,**  
*Amicus Curiae Pro Se.*



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# In the Supreme Court of the United States

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OCTOBER TERM 1969.

No. 305.

---

UNITED STATES,

*Petitioner,*

v.

JOHN SISSON,

*Respondent.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,  
FOR THE DISTRICT OF MASSACHUSETTS.

---

BRIEF FOR AMICUS CURIAE PRO SE.

---

## PRELIMINARY.

This brief *amicus curiae* is submitted *pro se*. The *amicus* is filing, first, as a lawyer; second, as a citizen twenty-five years old who is potentially subject to the draft and potentially personally interested in conscientious objector status.

1. *Flast v. Cohen* (1968) liberalized the rules on standing regarding free exercise of religion and establishment clause questions. As a corollary, it seems natural to expect the *amicus curiae* requirements to simultaneously be expanded.

2. A recent case in California, *People v. Beolus*, 80 Cal. R. 354 (1969) declared that lawyers had sufficient interest in a case involving the medical profession and abortions to merit standing to file a brief as a lawyer. This is the crux of my argument to file as a lawyer. Sim-

ilarly, it provides by analogy the basis for my argument to file as a citizen potentially "draft material" and potentially personally interested in conscientious objector status.

### STATEMENT.

John Sisson was convicted by a jury in the District Court sitting in Boston on March 21, 1969, for having refused to submit to induction into the armed forces under the Military Selective Service Act of 1967, U.S.C. Title 50 App. § 451 et seq. Pursuant to Rule 34 of the Rules of Criminal Procedure, Sisson filed an amended motion in arrest of judgment. The motion was granted on April 1, 1969. The government appeals according to the same rules under Title 18, § 3731, ch. 235 (Criminal Appeals Act).

According to the record, Sisson graduated from prep school and finished college in 1967, whereupon he began working for a newspaper. He does not now and never did claim that he is or was a religious conscientious objector. He requested and received the form for conscientious objectors but did not execute it, stating that he would not ask for or accept it (R.72), believing he was not entitled to the benefit of the exemption (R. 69-70), and believing that the system of exemptions and deferments is unjust and discriminatory (R. 72).

Sisson had acquainted himself with domestic and international matters bearing on the Vietnam war (R. 74-5). His table of ultimate values was moral and ethical. What another derived from the discipline of a church, Sisson derived from his priorities of conscience (R. 75-6); *United States v. Sisson*, 297 F. Supp. 902, at 905 (D. Mass. 1969). His belief was found to be sincere; in Judge Wyzanski's words, "(h)e was as genuinely and profoundly governed



by his conscience as would have been a martyr obedient to an orthodox religion." *Sisson, supra*, at 905. In addition, his views are reasonable, as similar views are held by reasonable men who are qualified experts; in this there is no dispute with the District Court.

He was convicted, nevertheless, but the District Court granted a motion in arrest of judgment, holding that granting to the religious conscientious objector but not to Sisson the conscientious objector exemption, the act violated the provision of the First Amendment that "Congress shall make no law respecting an establishment of religion."

### SUMMARY OF ARGUMENT.

If Sisson was advised of the extended definition of religion under which he might qualify for conscientious objector status, and if he did not pursue that status, he has deliberately failed to exhaust his administrative remedies and is precluded from seeking relief through the courts. The District Court erred in its finding that this constituted the only avenue for Sisson to challenge the Selective Service Act of 1967. Alternatively, if Sisson was not so advised, he was ill advised concerning the exemption status, and the conviction of guilty should be vacated and leave granted to Sisson to pursue his statutory exemption status under the belatedly revised statutory forms. The Circuit Court in *United States v. Powers*, 413 F.2d 834 (1st Cir. 1969), went too far in holding that a misleading form was not misleading in view of the opportunity to explain one's beliefs in detail and to seek the advice of the Selective Service Board.

In addition, religion is neither enhanced nor inhibited by the conscientious objector exemption. The people, through the actions of their Congress, have deemed religious and religious-like beliefs desirable. Congress, by

favoring one group, is not committed to favor all groups. A personal, merely moral code will not qualify for the present exemption. Moral codes or humanitarian values are merely components of, and not the basis for, the valid exemption. Also, opposition to war must be "to all war" or to "war in any form," as reiterated recently in *United States v. Curry*, 410 F.2d 1297 (1st Cir. 1969).

## ARGUMENT.

### I.

If Sisson was advised of the extended definition of religion under which he might have qualified for conscientious objector status, and if he did not pursue that status, he has deliberately failed to exhaust his administrative remedies and is precluded from seeking relief through the courts, and the Court should remand and order the District Court to file the judgment of guilty with leave granted to Sisson to appeal to the Court of Appeals. Alternatively, if Sisson was not so advised, he was ill advised concerning the exemption status, and the conviction of guilty should be vacated and Sisson granted leave to pursue his statutory exemption status under the belatedly revised statutory forms.

The Selective Service Act of 1967 had been passed on June 30, 1967. Sisson requested SSS Form 150 on February 29, 1968 (R. 69). Sisson received the old form which contained questions concerning belief in a Supreme Being. *United States v. Sisson*, 297 F. Supp. 902, at 905 (D. Mass. 1969). The form was not revised until August 30, 1968, when all references to a Supreme Being were deleted. Selective Service Regulations § 1043. From the record it appears that Sisson received only the old form

and no further instructions. He was therefore ill advised concerning his claimed conscientious objector status, for which he might have qualified under both the 1967 Act and the extended definition of religion in *United States v. Seeger*, 380 U.S. 163 (1965); *United States v. Kauten*, 133 F.2d 703, at 709 (2d Cir. 1943). Thus, if these are the facts on the record, the court should vacate the judgment and grant Sisson leave to pursue his statutory exemption status under the belatedly revised forms within 90 days.<sup>1</sup> However, if Sisson was advised at the time he was sent the forms of his ability to qualify for the status of conscientious objector under the *Seeger* definition, and if he did not pursue this status, he has deliberately failed to exhaust his administrative remedies.<sup>2</sup> He also did not express the sweeping opposition to all war and to war in any form which 50 U.S.C. App. § 456(j) requires. *United States v. Curry*, 410 F.2d 1297 (1st Cir. 1969). If these are the facts on the record, the court should remand, and order the District Court to file the judgment of guilty, with leave granted to Sisson to appeal to the Court of Appeals:

It should be so alternatively ordered.

<sup>1</sup> *Contra*, *United States v. Powers*, 413 F.2d 834 (1st Cir. 1969) where the appellant failed to complete SSS Form 150, declaring that he was misled by the words and statements of the Supreme Being question into thinking that he must possess an orthodox religious belief in order to qualify. The court (Coffin, J.) admitted that that the form presented obstacles but held they were not insurmountable, due to the opportunity to explain one's beliefs in detail and to seek the advice of the Selective Service Board. Appellant had availed himself of neither:

"Were unilateral, subjective uncounselled misunderstandings of Selective Service requirements and definitions to be a defense to prosecution, an already laboring vehicle would in all likelihood be completely immobilized." *Powers, supra*, at 836-7.

<sup>2</sup> *Id.*, at 837.

## II.

Religion is neither enhanced nor inhibited by the conscientious objector exemption. The people, through the actions of their Congress, have deemed religious and religious-like beliefs desirable. Congress, by favoring one group, is not committed to favor all groups.

It may seem ridiculous to issue the decision above, based on ripeness and lack of jurisdiction, when it merely postpones an inevitable clash between the Selective Service Act of 1967, Title 50, App. U.S.C. § 462, 32 C.F.R. 1632.14, and the Establishment Clause. The District Court and Sisson both admit that adherence to administrative procedure would have secured the religious conscientious objector status for Sisson under the definition set forth in *United States v. Kauten*, 133 F.2d 703, at 709 (2d Cir. 1943) by applying the "parallel to religion" test set out in *United States v. Seeger*, 380 U.S. 163 (1965). This is not disputed. *United States v. Sisson*, 297 F. Supp. 902, at 909 (D. Mass. 1969). Nor is Sisson's reluctance to follow that procedure questioned. Undoubtedly Sisson will be back in the courts, challenging the Selective Service Act under the liberal rules on standing to claim Establishment Clause violations, as set forth in *Flast v. Cohen*, 392 U.S. 83 (1968).

**A. Legislative History of the Conscientious Objector Exemption.**

The underlying justification for the conscientious objection status was that an individual who believed in a God who punishes after death those who take the lives of others should not be forced to choose between violating his country's laws and violating the law of a higher sovereign. The First Continental Congress passed a resolution protecting the rights of those whose religious principles

would not let them bear arms.<sup>3</sup> Similar enactments followed in the states: Vermont,<sup>4</sup> New York,<sup>5</sup> Pennsylvania,<sup>6</sup> Rhode Island,<sup>7</sup> and later in New Hampshire, Georgia, Maryland, Massachusetts, North Carolina, South Carolina, and Virginia.<sup>8</sup> All expressed the philosophy of the Declaration of Independence by reference to religious duties and duties of conscience in the exemption provisions. While the debates showed that the problem existed, the amendments were adopted without specifically referring to conscientious objectors.<sup>9</sup>

Following the Civil War, the first federal draft act was passed in 1863;<sup>10</sup> no provision exempted the conscientious objector but he could be relieved by finding a substitute or paying \$300.<sup>11</sup> A provision was enacted the following year, allowing non-armed duty after proof of real religious opposition.<sup>12</sup>

The National Defense Act of 1916<sup>13</sup> similarly demanded a conscientious religious belief. The Draft Act of 1917<sup>14</sup> exempted only a few conscientious objectors, those connected with a recognized "peace church" (this seems

<sup>3</sup> 2 *Journals of the Continental Congress* 189 (1905).

<sup>4</sup> 6 Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3741 (1909).

<sup>5</sup> Thorpe, *op. cit.*, note 4 *supra*, at 2637.

<sup>6</sup> *Id.*, at 3083.

<sup>7</sup> Rhode Island, *Act of January 7, 1740*, digested in 2 *Background of Selective Service*, pt. 12, at 59, 61 (Special Monograph 1, 1947).

<sup>8</sup> See *United States v. Macintosh*, 42 F.2d 845, at 847-8, n. 1, (2d Cir. 1930), *rev'd*, 283 U.S. 605 (1931).

<sup>9</sup> 1 *Gales Annals of Congress* 434, at 750-51 (1934).

<sup>10</sup> Act of March 3, 1863, ch. 75, § 2, 12 Stat. 731.

<sup>11</sup> *Id.*, § 13.

<sup>12</sup> Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 9.

<sup>13</sup> Act of June 3, 1916, ch. 134, 39 Stat. 166.

<sup>14</sup> Act of May 18, 1917, ch. 15, § 4, 40 Stat. 78.



to have been meant as a test of sincerity). A later regulation issued by the President (due to administrative difficulties) permitted noncombative military service for other conscientious objectors.<sup>15</sup>

In 1940 Congress considered and rejected an amendment to the Selective Service Act of 1940 proposed by the American Civil Liberties Union, which would have included "conscientious objectors on non-religious grounds who, by established membership in organizations like the Fellowship of Reconciliation, can establish the sincerity of their objections."<sup>16</sup> Instead, the 1940 Act<sup>17</sup> employed the "religious training and belief" qualification in the traditional sense of the term "religion," which required a belief in a Supreme Being.

Eight years later the exemption was again based upon "religious training and belief"; The Selective Service Act of 1948<sup>18</sup> explicitly stated:

"Religious training and belief in this connection mean an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

This remained in effect until the presently questioned Selective Service Act of 1967<sup>19</sup> was passed, omitting reference to a "Supreme Being."

<sup>15</sup> Exec. Order No. 2823, March 20, 1918.

<sup>16</sup> Hearings on S. 4164 Before the Senate Subcommittee on Military Affairs, 76th Cong., 3d Sess. 308 (1940).

<sup>17</sup> Selective Training and Service Act of 1940, ch. 520, § 5 (g), 54 Stat. 889.

<sup>18</sup> 62 Stat. 613 (1948), 50 U.S.C. App. § 456 (j) (1958).

<sup>19</sup> 32 U.S.C. § 51 (1967).

(NOTE: Footnotes 19 to 26, all referring to the same source, are incorrectly cited. The correct cite has not been discovered; it will be added if it is discovered before mailing.)

32 U.S.C. § 51 (1967) has as its purpose the establishment of

“uniform procedures for the utilization of conscientious objectors in the Armed Forces and considerations of request for discharge on the ground of conscientious objection.”<sup>20</sup>

It applied to all armed forces personnel.<sup>21</sup> No vested right exists for any individual to be discharged from the service; rather, it is discretionary, with the service based on each case.<sup>22</sup> Though not specifically determined to apply to those not yet in the armed forces, it is a natural extension of the provision to include those protesting their classification as other than conscientious objector.

The policy of allowing the status of conscientious objector is clearly set forth:<sup>23</sup>

“(b). The fact of conscientious objection does not exempt men from the draft; however, the Congress has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces, and accordingly has recognized bona fide religious objection to participation, in war in any form, to the extent that such an objector (1-0 classification) is not inducted into the Armed Forces but is required to serve his country for the same period of time in civilian work contributing to the maintenance of national health, safety, or interest under a prescribed Alternate Service Plan (Conscientious Objectors' Work Program). Consistent with this national policy, bona fide conscientious objection by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable.”

<sup>20</sup> *Id.*, § 51.1.

<sup>21</sup> *Id.*, § 51.2.

<sup>22</sup> *Id.*, § 51.3(a).

<sup>23</sup> *Id.*, § 51.3(b).

In addition, the Selective Service System has set forth criteria and procedures, e.g., timeliness,<sup>24</sup> sincerity,<sup>25</sup> statement of counselling,<sup>26</sup> which must be followed by one seeking classification as a conscientious objector, or seeking discharge or reassignment on the basis of such a classification.

<sup>24</sup> *Id.*, 51.3(c):

"Federal courts have held that a claim to exemption from military service under the UMT & S Act must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained."

<sup>25</sup> *Id.*, 51.3(e):

"In evaluating requests for discharge based on conscientious objection, great care must be exercised to insure the sincerity of the claim. It is essential that discharge procedures of the services not invite or permit abuse by unscrupulous persons who seek to avoid all obligations on the grounds of religious belief. Claims of conscientious objection by all persons, whether existing before or after entering military service, should be judged by the same standards."

<sup>26</sup> *Id.*, 51.7:

"I have been counseled concerning designation as a conscientious objector. Based on my religious training and belief, I consider myself to be a conscientious objector and am conscientiously opposed to participation in combatant training and service. I request assignment to noncombatant duties for the remainder of my term of service. I fully understand that on expiration of my current term of service, I am not eligible for voluntary enlistment, reenlistment, or active service in the Armed Forces."

## B. The First Amendment and the Conscientious Objector Exemption.

The above classification is clearly limited to those persons whose religious beliefs clash with duties imposed on those serving in the armed forces. Other procedures have been set forth to cover those adjudged mentally or physically deficient as regards military service. Those found physically and mentally suitable by the Selective Service System can interpose no belief save religion to stay their induction or alter their draft status.

The traditional position of religion in respect to the military is well settled. The "wall of separation"<sup>27</sup> is latticed with many doorways here, for while the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers, it does not require the state to be their adversary." *Everson v. Board of Education*, 330 U.S. 1, at 18 (1947). Commissioned chaplains date from the early history of the armed forces;<sup>28</sup> they conduct services and use property belonging to the United States.<sup>29</sup> The Servicemen's Readjustment Act of 1944<sup>30</sup> enables eligible veterans to study for the ministry at denominational schools at government expense. West Point and Annapolis have chaplains and

<sup>27</sup> *Reynolds v. United States*, 98 U.S. 145, at 146 (1878).

<sup>28</sup> 3 Stat. 297 (1816); see Brennan, J., concurring in *Abington School District v. Schempp*, 374 U.S. 203, at 299 (1963):

"\* \* \* (H)ostility, not neutrality would characterize the refusal to provide chaplains, the withholding of draft exemptions for ministers and conscientious objectors \* \* \*. I do not say that the government *must* provide chaplains or draft exemptions, or that the courts should intercede if it fails to do so."

<sup>29</sup> Army Reg. No. 60-5 (1944); U. S. Navy Reg. ch. 1 §.2 and ch. 34, § 1-2 (1920).

<sup>30</sup> 58 Stat. 289.

religious activities, many of which are compulsory.<sup>31</sup> Allowing one to serve his country by means other than the actual bearing of arms, e.g., medical assistants and clerks, is also an established practice.<sup>32</sup>

### C. Legal History of the Conscientious Objector Exemption.

Legislative enactments were paralleled by action taken by the judicial and executive branches of government. This Court (White, J.) in 1918 summarily dismissed the objection to the Draft Act of 1917 that, by exempting ministers of religion and theological students under certain conditions and by relieving from strictly military service members of certain religious sects whose tenets deny the moral right to engage in war, the draft law was repugnant to the First Amendment as establishing or interfering with religion:

"\* \* \* And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more." *Selective Draft Cases*, 245 U.S. 366, at 389-90 (1918).

The court accepted the argument of the counsel for the United States that the challenged provision<sup>33</sup> did

<sup>31</sup> See Reed, J., dissenting in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, at 254 n. 30 (1948).

<sup>32</sup> See Argument for the United States in *Selective Draft Law Cases*, 245 U.S. 366, at 374-75 (1918), tracing the exemption of Quakers and other conscientious objectors back to the Revolutionary War. For other examples, see *Engel v. Vitale*, 370 U.S. 421, at 437 n. 1 (Douglas, J., concurring) (1962).

<sup>33</sup> *Selective Draft Act (Law) of May 18, 1917*, 40 Stat. 76, at 78:

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nothing respecting an establishment; "on the contrary, it goes far as to aid in the free exercise of those religions which forbid participation in war." *Id.*, at 374. In addition, it serves a useful law purpose inasmuch as it guarantees to the armed forces that their ranks will be filled by men willing to fight and obey orders.<sup>34</sup>

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"Sec. 4. That the Vice President of the United States, officers, legislative, executive, and judicial, of the United States, Territories, and the District of Columbia, regular or duly ordained ministers of religion, students who at the time of the approval of this Act are preparing for the ministry in recognized theological or divinity schools, and all persons in the military and naval service of the United States shall be exempt from the selective draft herein prescribed; and nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted from service shall be exempted in any capacity that the President shall declare to be non-combatant \* \* \*."

<sup>34</sup> See also *Kramer v. United States*, 245 U.S. 478 (1918), where the objection was not motivated by religion but by a philosophical, social, or moral belief. This court made clear that the basis of the act's exemption was religious, defining religion as "one's views of his relations to his Creator, and to obligations they impose." *Davis v. Beason*, 133 U.S. 333, at 343 (1889).

But see Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 Geo L.J. 252, at 262 n. 45 (1962-1963), citing Brief for Appellant, at 33 and 39, *Goldman v. United States*, 245 U.S. 474 (1918), a related case arguing that exemption of members of a "well recognized religious sect" established religion, prohibited free exercise, and combined church and state:

"You may have two persons of exactly the same religious conviction of opposition to participation in war in any form. They may believe firmly 'thou shall not kill' \* \* \*

(B)oth derive their convictions from the same source, their conscience; but one of them belongs to a well-recognized reli-

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Until recently the United States circuit courts of appeal unanimously held there was no constitutional right to refuse to bear arms in defense of the United States. E.g., *United States v. Kime*, 188 F.2d 677 (7th Cir.), cert. denied, 338 U.S. 947 (1950); *Barley v. United States*, 134 F.2d 937 (4th Cir. 1943). Both were traceable to two higher court cases. In *United States v. Macintosh*, 283 U.S. 605 (1931), the court answered the argument (set forth by one seeking naturalization) that there was a constitutional right to refuse to bear arms, thus (at 623-24):

"This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him \* \* \* The privilege of the \* \* \* conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress. That body may grant or withhold the exemption in its wisdom as it sees fit \* \* \*."

The same reasoning was echoed in *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934). Justice Cardozo stated, concurring at 268:

"Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in further-

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gious sect and the other does not. The one who belongs to a well-recognized religious sect is exempted from the duty of engaging in the combatant services of the war if those are its principles, and the other for his honest conviction, because he refused to serve, is made a felon and subjected to severe penalties. If this is not making a law 'respecting an establishment of religion' and 'prohibiting the free exercise thereof' \* \* \* no such law can be devised."

ance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle \* \* \* which may turn out in the end to be a delusion or an error \* \* \* does not prove by his martyrdom that he has kept within the law."

Up to this time "conscientious objector" was used only in respect to "religion" as defined in *Davis v. Beason*, 133 U.S. 333, at 342 (1890), and *United States v. Macintosh*, 283 U.S. 605, at 633 (1931). The rights of the "non-believer" had not been safeguarded by Congressional exemption.

In 1943 a dictum uttered earlier in a Second Circuit decision<sup>35</sup> involving an atheist who regarded the war as a Presidential scheme to relieve unemployment was seized by the same court as a basis for a later decision.<sup>36</sup> Referring to the Selective Service Act of 1940 provision for conscientious objection, the earlier dictum had "redefined" religion.<sup>37</sup>

"The provisions of the present statute (1917-ed.) \* \* \* take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of exemption \* \* \*

"There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the

<sup>35</sup> *United States v. Kauten*, 133 F.2d 703, at 709 (2d Cir. 1943).

<sup>36</sup> *United States ex rel. Phillips v. Downer*, 135 F.2d 521 (2d Cir. 1943).

<sup>37</sup> *Kauten*, note 33 *supra*, at 709.

basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."

Overlooking Congressional intent and knowledgeable of the workability of the 1917 provision, the court used this dictum to find that vague opposition to all wars, though made up in part by humanitarian or philosophical beliefs, met the test of a religious belief. *United States ex rel. Phillips v. Downer*, 135 F.2d 521, at 524-25 (2d Cir. 1943). "Religion" no longer meant denominational affiliation.

However, three years later the Ninth Circuit in *Berman v. United States*, 156 F.2d 377 (9th Cir.), cert. denied, 329 U.S. 795 (1946), rejected the troublesome dictum with this reasoning (at 380-81):

"It is our opinion that the expression 'by reason of religious training or belief' is plain language, and was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one. \* \* \* There are those who have a philosophy of life and live up to it. There is evidence that this is so in regard to appellant. However, no matter how pure and admirable his standard may be, and no matter how devoutly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion."<sup>38</sup>

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<sup>38</sup> This was expressly cited by the Senate in drafting the Selective Service Act of 1948; see S. Rep. No. 1268, 80th Cong., 2d Sess. 14 (1948).

The Selective Service Act of 1948<sup>39</sup> similarly based the exemption upon religious training and belief. Its constitutionality was upheld in a dictum in *George v. United States*, 196 F.2d 445, at 451-52 (9th Cir.), cert. denied, 334 U.S. 843 (1952), and by *Clark v. United States*, 236 F.2d 13 (9th Cir.), cert. denied, 352 U.S. 882 (1956).

The first hesitant step in re-evaluation of the free exercise problem with regard to conscientious objectors came forth in a new "definition" of religion put forth by this Court in *Torcaso v. Watkins*, 367 U.S. 488 (1961). Holding that a Maryland constitutional provision requiring a declared belief in the existence of God in order to qualify for the office of notary public to be an invasion of freedom of belief and religion, this Court said (at 495):

"We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in religion.' Neither can constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God against those religions founded on different beliefs."

This decision, it has been contended,<sup>40</sup> silently ruled that the "belief in a Supreme Being" clause in the 1948 Selective Service Act<sup>41</sup> is unconstitutional. But it did not rule that "religion" as used in the context of the First Amendment must include any philosophical, sociological,

<sup>39</sup> 62 Stat. 613 (1948), 50 U.S.C. App. § 456(j) (1958).

<sup>40</sup> Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 Geo. L.J. 252 (1962-1963); compare Sibley and Jacob, *Conscription of Conscience: The American State and the Conscientious Objector, 1940-1947* (1952).

<sup>41</sup> 62 Stat. 612 (1948), 50 U.S.C. App. § 456(j) (1958).



political, or humanitarian belief which any group calls "religion" in order to be constitutional, as roughly expounded in *United States ex rel. Phillips v. Downer*, 135 F.2d 521 (2d Cir. 1943). However, "Supreme Being" was to be qualified in 1965 and omitted in 1967.

Just four years ago in *United States v. Seeger*, 380 U.S. 163 (1965) this Court faced claims for exemption under § 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. § 456(j) (1958), by three claimants who did not belong to an organized religious sect. None of their beliefs fitted squarely within the statutory definition. The test of "religious belief" was held by a unanimous court to be a sincere and meaningful belief in a Supreme Being or belief occupying in the life of its possessor a place parallel to that filled by the God of those who admittedly qualified for the exemption; the exemption did not, however, cover those who oppose war from a merely personal moral code nor those who decide that war is wrong on the basis of essentially political, sociological, or economic considerations rather than religious belief. The case did not involve atheists and the court did not deal with the question of atheistic beliefs (at 173). The Congress expressly used the term "Supreme Being" rather than "God" (at 165) and specifically intended to re-enact the provisions of the 1940 Act but not the interpretation of *Berman v. United States*, 156 F.2d 377 (9th Cir.), cert. denied, 329 U.S. 795 (1946). The local boards are to determine sincerity and "religious-ness" and not reject beliefs on the mere ground that they are incomprehensible. Emphasizing the many modern definitions of religion and non-Western religion, the court kept the *Kauten* (notes 35 and 37, *supra*) "definition" and specified a test by which to measure it.

The words "Supreme Being" do not appear in the

Selective Service Act of 1967, which limits itself to religious objection to war in any form.

#### D. Tests for Violation of the Free Exercise and the Establishment Clauses.

Among religions the government is neutral. *Abington School District v. Schempp*, 374 U.S. 203, at 215-16 (1963). It is also separate. *Zorach v. Clauson*, 343 U.S. 306, at 312 (1952); *McGowan v. Maryland*, 366 U.S. 420, at 441-42 (1961); *Torcaso v. Watkins*, 367 U.S. 488, at 495 (1961); *Engel v. Vitale*, 370 U.S. 421, at 425 (1962). But while the government cannot pick and choose between religions and aid one or several while others are ignored, can religious belief be granted a special position by Congress in defining the classifications of men to be inducted into the military service, a position not available to others? It is to this question that I now turn.

Three points must be kept in mind. First, we are, as Justice Douglas stated, "a religious people." *Zorach, supra*, at 313. The place of religion in our society is an exalted one. *Schempp, supra*, at 226. Second, conscientious objector status for those seeking it on religious grounds has existed for many years; "this Court cannot be too cautious in upsetting practices imbedded in our society by many years of experience." Reed, J., dissenting in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, at 256 (1948). Third, the court has not been blind to the existence of views which do not lie comfortably in the pattern of established "conventional" religions. *Schempp, supra*, at 805 n. 3; <sup>42</sup> *United States v. Seeger*, 380 U.S. 163 (1965).

<sup>42</sup> Quoting 201 F. Supp. 815, at 818:

"Edward Schempp, the children's father, testified that after careful consideration he had decided that he should not

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In the former this Court exhibited its concern for all religious beliefs, while in the latter extending its concern to conscience and other paralleling beliefs. Similarly, the court is also aware that an alliance of government and religion destroys the former, degrades the latter, and inevitably engenders the "hatred, disrespect, and even contempt of those who hold contrary beliefs." *Engel v. Vitale*, 370 U.S. 421, at 443 (1962), citing *Memorial and Remonstrance Against Religious Assessments*, II Writings of Madison 183, 190.

The tests for violation of the free exercise and establishment clauses were carefully laid out in *Schempp, supra*, at 222-23:

"The (Establishment Clause) test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the structures of the Establishment Clause there must be

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have Roger or Donna excused from attendance<sup>6</sup> at these morning ceremonies. Among his reasons were the following. He said that he thought his children would be "labeled as 'odd balls' " before their teachers and classmates every day; that children, like Roger's and Donna's classmates, were liable to "lump all particular religious differences or religious objections (together) as 'atheism' and that today the word 'atheism' is often connected with 'atheistic communism,' and has 'very bad' connotations, such as 'un-American' or \* \* \* (pro) Red," with overtones of possible immorality. Mr. Schempp pointed out that due to the events of the morning exercises following in rapid succession, the Bible reading, the Lord's Prayer, the Flag Salute, and the announcements, excusing his children from the Bible reading would mean that probably they would miss hearing the announcements so important to children. He testified also that if Roger and Donna were excused from Bible reading they would have to stand in the hall outside their 'home-room' and \* \* \* this carried \* \* \* the imputation of punishment for bad conduct."

a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education*, 330 U.S. 1 (1947); *McGowan v. Maryland*, 366 U.S. 420 (1961). The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.”

#### E. Decision.

The Establishment Clause has not been violated here. Deletion of “Supreme Being” in the conscientious objector section of legislation not yet two years old and the extended “definition” of religion given by this court in *Kauten*, *supra*, and *Seeger*, *supra*, rebut any inference that the purpose or primary effect of the enactment is the advancement or inhibition of religion. Both the Congress and this court concur on this point. Though the present interpretation may seem objectionable to some,<sup>43</sup> if it does in fact constitute a governmental acknowledgment of the value of religious or religious-like beliefs, the fact remains that it is what the people through the action of their Congress at the time of the Constitution and ever since have expressed as desirable.<sup>44</sup>

<sup>43</sup> *Zorach v. Clauson*, 343 U.S. 306, at 313 (1952).

<sup>44</sup> See, for example, Waite, “Jefferson’s ‘Wall of Separation’: What and Where?” 33 Minn. L. Rev. 494, at 519 (1949):

(Continued on following page)

This court and Congress have adhered to religious beliefs and beliefs paralleling religious beliefs. While undoubtedly conscience is formed by humanitarian, sociological, and personal moral ideals, these themselves have not qualified for the exemption.<sup>45</sup>

Were Congress to amend the present law and completely deny the privilege of an exemption to conscientious objectors, as it has the power to do,<sup>46</sup> the argument that the free exercise of religion by Quakers and others was being coerced would have to be met. The court should

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(Continued from preceding page)

"\* \* \* (If the establishment of religion clause) now coming to the fore is to be applied with due regard to existing conditions and the spirit of the times, must not the Court adopt a more positive (approach) and forward-looking attitude than it has yet taken? Is such an attitude disclosed by emphasis upon a 'wall of separation between church and state'? Do not concepts of religious liberty and the distinction between religion and a religious cultus—i.e., a sect or organization church—made long ago in *Davis v. Beason*, suggest sounder bases of interpretation?"

<sup>45</sup> Thus, I would not overturn *Tamarkin v. United States*, 260 F.2d 436 (5th Cir. 1958), cert. denied, 359 U.S. 925 (1959), where the Circuit Court found that the evidence submitted by the appellant furnished a basis in fact for the Board's decision that appellant's "beliefs in vegetarianism represented 'essentially political, sociological, or philosophical views, or a merely personal moral code' " \* \* \* (260 F.2d 436, at 437).

<sup>46</sup> There is no constitutional right to be exempted from military service because of conscientious objection or religious calling; rather, the exemption springs from Congress. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, at 29 (1905); *United States v. Macintosh*, 283 U.S. 605, at 624 (1931); *In re Summers*, 325 U.S. 561, at 572-73 (1945); *Richter v. United States*, 181 F.2d 591, at 593 (9th Cir. 1950); *Ruse v. United States*, 129 F.2d 204, at 209-10 (6th Cir. 1942); *Berman v. United States*, 156 F.2d 377, at 381-85 (9th Cir. 1945); *Gara v. United States*, 178 F.2d 38, at 41 (6th Cir. 1949); *Cannon v. United States*, 181 F.2d 354, at 355-56 (9th Cir. 1950); L. Hand, *The Bill of Rights*, (Oliver Wendell Holmes Lectures) (Harvard University Press), at 64 (1958).



postpone its decision upon this point until such time as Congress has so acted.<sup>47</sup> Similarly, the court is not confronted with the question of just versus unjust war, e.g., as regards Catholics, in this case.

Meanwhile, the free exercise of "parallel believers" is not infringed, because of the holding of *Seeger, supra*. The religious are not preferred over the non-religious, although this has meant invalidating the use of any objective test in the practical application of the exemption provisions, and, correspondingly, authorizing a subjective inquiry into the genuineness, i.e., sincerity,<sup>48</sup> of the claimant's objections.<sup>49</sup> But I feel the local boards are qualified

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<sup>47</sup> Note, however, that there are limits to the free exercise of religion, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); See also *George v. United States*, 196 F.2d 445, at 449-50 (9th Cir.), cert. denied, 334 U.S. 843 (1952):

"It is established constitutional doctrine of long standing that exemptions of this character do not spring from the Constitution, but from the Congress. \* \* \* This being so, there is brought into play the familiar principle that whatever the government, State or Federal, may take away altogether, it may grant only on certain conditions. Otherwise put, whatever the Government may forbid altogether, it may condition even unreasonably."

However, if Congress should eliminate the exemption, the test of the free exercise objection would be the degree of disruption which would follow. See Note, Constitutional Law, Armed Forces, Conscientious Objectors, 79 H. L. Rev. 113, at 116 (1965-1966).

<sup>48</sup> Jackson, J., dissenting in *United States v. Ballard*, 322 U.S. 78, at 92-5 (1944) (difficulty of ascertaining sincerity).

<sup>49</sup> Thus, the words of Douglas, J., concurring in *Abington School District v. Schempp*, 374 U.S. 203, at 265 (1963), will have been heeded:

"But the teachings of both *Torcaso* and the *Sunday Law Cases* is that government may not employ religious means to serve secular interests, however legitimate they may be, without the clearest demonstration that non-religious means will not suffice." (footnote omitted.)

to administer such a subjective determination of sincerity, giving greater weight to individual characterization of beliefs and not discounting such beliefs merely because they are "incomprehensible" (*Seeger, supra*).

### III.

A merely personal moral code will not qualify for the present exemption. Moral codes or humanitarian values are merely components of, and not the basis for, the valid exemption. In addition, opposition to war must be "to all war" or to "war in any form."

John Sisson did not attempt to secure conscientious objector status, even though he might have met the *Seeger* requirements. *United States v. Sisson*, 297 F. Supp. 902, at 908-9 (1969). According to the record, his beliefs might have fitted into the framework of *Kauten, supra*, and *Seeger, supra*, rather than be purely a merely personal moral code. He claims to have been sincere, and nothing in the record contradicts that assertion. Though he seemingly waited until the administrative process was over because he had no choice, citing *Clark v. Gabriel*, 393 U.S. 256, at 259 (1968), *Sisson, supra*, at 906, he actually did not exhaust his remedies. Nevertheless, he wished the constitutionality of the Selective Service Act of 1967 to be challenged in a court. (R. 69-70, 72, 74).

The basis of Sisson's claim is prejudice in favor of religions in the conscientious objector exemption as enacted in 1967, i.e., "religious" believers can qualify for an exemption not available to "non-religious" believers. (R. 70). More precisely, two issues have been put before this court. First, Sisson's objection is selective, i.e., he is opposed to *this* war, which he has termed immoral, unjust, and unjustifiable. (R. 74). Second, he asserts that his

personal moral code, which is the basis for his opposition to this war, should entitle him to refuse to submit to induction. (R. 74).<sup>50</sup>

The District Court went slightly amiss of these issues in deciding that " \* \* \* as a sincere conscientious objector, Sisson cannot constitutionally be subjected to military orders (not reviewable in a United States constitutional court) which *may* require him to kill in the Vietnam conflict." (Emphasis added) *Sisson, supra*, at 921. If Sisson possessed that status,<sup>51</sup> he would not be so ordered. If Congress eliminated the status, he would be subject to such orders and the penalties for disobedience. As Judge Wyzanski himself admits, "Religious liberty and liberty of conscience have limits in the face of social demands of a community of fellow citizens." *Sisson, supra*, at 910. So the actual lower court holding, as summarized, is not of great importance. Therefore, the court should turn to the two issues before it.

First, a merely personal moral code will not qualify one for the present exemption, as previously stated. Precedent and legislative history preclude such an interpretation of "religious training and belief." Congress was not deaf to the 1965 *Seeger* opinion issued by this court; the 1967 deletion of the "Supreme Being" requirement is the best proof of that. The final drafted provision of the exemption, therefore, establishes the actual influence of

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<sup>50</sup> Judge Wyzanski agrees that if the government proves Sisson guilty of refusal to submit to induction, Sisson cannot use as a statutory excuse the fact that he regarded the war as illegal, immoral, or unjust. *Sisson, supra*, at 904.

<sup>51</sup> "The rationale by which *Seeger* and his companions on appeal were exempted from combative service under the statute is quite sufficient for Sisson to lay valid claim to be constitutionally exempted from combat service in the Vietnam type of situation." *Id.*, at 909.

*Seeger* much more, even, than the legislative history of the events and debates leading to its passage, as in the precedents enumerated earlier.

Putting aside the historical aspects, there is a very practical reason for exclusion of a merely personal moral code from the conscientious objector exemption. Disobedience to religious commands threatens the "sinner" with eternal damnation. It is doubtful that one forced to fight in violation of his merely personal moral code (as opposed to religious beliefs, parallel-to-religious beliefs, or conscience) feels threatened with an eternity in hell. The original Congressional purpose for the exemption is missing in his case. As the stated history indicates, the Congress has not gone beyond formal religious beliefs until pressured there by Presidential declarations or court "redefinitions"; the latter extended the definition to include conscience but not a merely personal moral code, and I cannot say they did not deal with a generation and Congress as or more skeptical than our own. *Sisson* may not enjoy the exemption which he does not seek, brands as unjust, and challenges as unconstitutional.

I do not demean moral codes or humanitarian values. They are important, unquestionably, and many adhere to them at great price. But these are the components of, and not the basis for, the valid exemption based on religious belief or conscience. And despite the sacrifices many are compelled to make in adhering to such codes or values, the words of Justice Cardozo, concurring in *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, at 268 (1934) are still true: "one who is a martyr to a principle \* \* \* does not prove by his martyrdom that he has kept within the law."

The District Court, *Sisson, supra*, at 909, quoted Whitehead—"religion is what the individual does with

his solitariness." (*Religion in the Making*). This smacks of Thomas A' Kempis' assertion that "every time I go out in the world I become less a man." (*The Imitation of Christ*). But it is not the job of this court to define what is religious, philosophical, or cowardice.

Secondly, Sisson cannot refuse induction or qualify for conscientious objector status if his opposition is to *this* war, i.e., Vietnam. There is no certainty that he will be assigned to kill rather than to a clerical or other position, in the event he is ordered to Vietnam. There is no certainty that he will be sent to Vietnam; only a minute fraction of our armed forces are engaged in that war. Once in the service, he can utilize application for the very exemption he challenges to avoid combat duty or achieve discharge from the service. The uncertainties are overwhelming, making the precise concern of the District Court premature.

In addition, the present and earlier provisions demand conscientious objection "to all wars" or to "war in any form,"<sup>52</sup> be it at the banks of the Rhine, the Thames, or the Ohio River. Most of those who have served in the armed forces during wartime in the past have done so only for one war. Most are only faced with such a prospect once in their lifetime, as individuals and nations struggle to eliminate war entirely. Thus, the opposition to all war is necessary to make the privilege practical and capable of serving the ends for which it has been passed and repassed by the Congress. Otherwise, multitudes would philosophically object to the first war confronting them, realizing that there will be no real threat of a "second call." Finally, I can see no practical way to test the justifications offered for objecting to *this* war but not all wars.

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<sup>52</sup> *United States v. Curry*, 410 F.2d 1297, at 1299 (1st Cir. 1969).



**CONCLUSION.**

Thus, for the reasons stated, I believe that the Selective Service Act of 1967 conscientious objector exemption does not violate the establishment clause, and I urge this court to so decide this issue in this case.

Respectfully submitted,

FRANK P. SLANINGER,

*Amicus Curiae Pro Se.*

November 25, 1969





NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 305.—OCTOBER TERM, 1969

United States, Appellant, | On Appeal From the United  
v. | States District Court for the  
John Heffron Sisson, Jr. | District of Massachusetts.

[June 29, 1970]

MR. JUSTICE HARLAN delivered the opinion of the Court.\*

The Government seeks to appeal to this Court a decision by a District Court in Massachusetts holding that appellee Sisson could not be criminally convicted for refusing induction into the Armed Forces. The District Court's opinion was bottomed on what that court understood to be Sisson's rights of conscience as a nonreligious objector to the Vietnam War, but not wars in general, under the Free Exercise and Establishment Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The District Court's primary conclusion, reached after a full trial, was that the Constitution prohibited "the application of the 1967 Draft Act to Sisson to require him to render combat service in Vietnam" because as a "sincerely conscientious man," Sisson's interest in not killing in the Vietnam conflict outweighed "the country's present need for him to be so employed," 297 F. Supp. 902, 910, (1969).

The District Court characterized its own decision as an arrest of judgment, and the Government seeks review here pursuant to the "arresting judgment" provision of the Criminal Appeals Act, 18 U. S. C. § 3731, an Act

\*MR. JUSTICE BLACK joins only Part IIC of this opinion. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join the entire opinion.

that narrowly limits the Government's right to appeal in criminal cases to certain types of decisions. On October 13, 1969, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits, 396 U. S. 812 (1969). For reasons which we elaborate in what follows, we conclude that the decision below, depending as it does on facts developed at Sisson's trial, is not an arrest of judgment but instead is a directed acquittal. As such, it is not a decision that the Government can appeal. Consequently, this appeal must be dismissed for lack of jurisdiction without our considering the merits of this case. We, of course, intimate no view concerning the correctness of the legal theory by which the District Court evaluated the facts developed at the trial.<sup>1</sup>

As a predicate for our conclusion that we have no jurisdiction to entertain the Government's appeal, a full statement of the proceedings below is desirable.

### I

A single-count indictment charged that Sisson "did unlawfully and knowingly and wilfully fail and neglect and refuse to perform a duty" imposed by the Military Selective Service Act and its regulations, in violation of § 12 of the Act, 50 U. S. C. App. § 462 (a) (Supp. IV), because he failed to obey an order by his local draft board to submit to induction.

Prior to trial, Sisson's attorney moved to dismiss the indictment on three grounds. It was claimed that Sisson's refusal to submit to induction was justified first, because "the government's military involvement in Vietnam violates international law"; and, second, because

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<sup>1</sup> We have today granted certiorari in *Gillette v. United States* (No. 1170), and *Negre v. Larsen* (Misc. No. 1669), in order to consider the "selective" conscientious objector issue which underlies the case now before us but which we cannot reach because of our conclusion that we have no jurisdiction to entertain this direct appeal.



Sisson "reasonably believed the government's involvement in Vietnam to be illegal." As a third ground, Sisson claimed that the Selective Service Act, and its regulations were unconstitutional (a) because the procedures followed by local boards lacked due process; and (b) because compulsory conscription during peacetime is unnecessary and stifles fundamental personal liberties. In support of the motion to dismiss, appellee stated:

"At the time I refused to submit to induction into the armed forces I believed, as I believe today, that the United States military involvement in Vietnam is illegal under the international law as well as under the Constitution and treaties of the United States. I believed then, and still believe, that my participation in that war would violate the spirit and letter of the Nuremberg Charter. On the basis of my knowledge of that war, I could not participate in it without doing violence to the dictates of my conscience."

At the hearing on appellee's motion to dismiss, the District Judge said that he had "an open mind" concerning appellee's first and third grounds. However, the court said there was "nothing to" the second ground, noting that what "the defendant reasonably believes . . . cannot be raised in the way you propose . . . because that does not appear on the face of the indictment." (App. 49.) The District Court later amplified this conclusion by saying:

"Point 2 is plainly premature because nobody can test the issue as to whether defendant reasonably believes the government's military involvement in Vietnam is illegal without knowing what he reasonably believed, and *what he believed is a question of evidence and not a question which appears on the face of the indictment.*" (App. 52.) (Emphasis supplied.)

Defense counsel did not dispute the District Court's analysis, and noted that he had raised the issue in his motion to dismiss only "in the interest of economy," because "[i]t was not clear at the time I filed the motion that the government would challenge this fact." (App. 52.) The court expressed doubts concerning the Government's willingness to concede this fact, and when asked by the court, the government counsel specifically stated his opposition to the motion to dismiss. The court thereupon found the "second ground" of the motion to dismiss without merit.

A short time after this hearing, the District Court issued two written opinions, 294 F. Supp. 511, 514 (1969), that denied the other grounds of the motion to dismiss. After determining that appellee had the requisite standing to raise the issues involved, the court held that the political question doctrine foreclosed consideration of whether Congress could constitutionally draft for an undeclared war, or could order Sisson to fight in the allegedly "genocidal war."

An order accompanying the second pretrial opinion also dealt with various offers of proof which defense counsel had made in an informal letter to the court, not part of the record. From the order it appears that appellee's counsel stated he would "offer evidence to show that [Sisson] refused to be inducted on the basis of his right of conscience both statutory and constitutional." Not understanding the scope of this rather ambiguous offer of proof, the District Court in its order ruled that if Sisson wished to make a conscientious objector claim based on religious objections not to wars in general but to the Vietnam War in particular, Sisson should make his offer of proof initially to the judge

"to elicit a ruling whether the First Amendment precludes the Congress from requiring one who has religious conscientious objections to the Vietnam war to respond to the induction order he received.

If the Court rules favorably to defendant on the Constitutional issue of law, then both defense and prosecution are entitled to submit to the trier of fact evidence relevant to the question whether defendant indeed is a religious conscientious objector to the Vietnam war." 294 F. Supp., at 519.

At the trial, however, it appears that defense counsel did not try to prove that Sisson should have received a conscientious objector exemption, or requested a ruling on the First Amendment issues referred to by the trial court. Instead it seems that the defense strategy was to prove that Sisson believed the Vietnam War to be illegal under domestic and international law, and that this belief was reasonable. If unable to get a direct adjudication of the legality of the war, the defense at least hoped to convince the jury that Sisson lacked the requisite intent to "willfully" refuse induction.<sup>2</sup>

There was evidence submitted at the trial that did bear on the conscientious objector issue, however. When asked why he had refused induction, Sisson emphasized that he thought the war illegal. He also said that he felt the Vietnam War was "immoral," "illegal," and

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<sup>2</sup> Not only did the defense itself avoid advancing any theory or proof that Sisson deserved conscientious objector status, but there are even indications that the defense purposefully attempted to keep the issue out of the case. For example, at one point in the trial the Marine officer who called Sisson for induction stated that Sisson had told him at the time that he was refusing induction because of religious belief, and his "conscientious objector status." (App. 143.) Later, when questioned by his own counsel, Sisson not only denied having the conversation with the officer but also stated that he had never applied for C. O. status (1) because he couldn't honestly claim "conscientious objection to war in any form as it is put on the Form 150"; and (2) because he believed "the system of exemptions and deferments [to be] unequal and discriminatory against those who do not have an education . . . or money." Sisson stated flatly that he therefore "could not accept such a deferment." (App. 147-150.)

"unjust," and went against "my principles and best sense of what was right." The court asked Sisson what the basis for his conclusions was, particularly what Sisson meant when he said the war was immoral. Sisson said that the war violated his feelings about (1) respect for human life, (2) value of man's freedom, and (3) the scale of destruction and killing consonant with the stated purposes of American intervention. Sisson also stated, in response to the trial judge's question, that his "moral views come from the same sources [the trial court had] mentioned, religious writings, philosophical beliefs."

The prosecution did not allow Sisson's testimony to stand without cross-examination. In apparent reliance on the court's pretrial ruling that Sisson's beliefs concerning the war were irrelevant to the question of whether his refusal to submit to induction was willful,<sup>3</sup> the government counsel concentrated on showing that Sisson had refused induction deliberately, of his own free will, and knowing the consequences. The prosecution also brought out that Sisson had failed to appeal his I-A classification when it had been issued, and that he had accepted, as an undergraduate, a 2-S student classification.

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<sup>3</sup> Among the various offers of proof made by Sisson's attorney before the trial was one to show that Sisson "reasonably believed the Vietnam war to be illegal," and that he therefore lacked the requisite intent to "wilfully" refuse induction. In the pretrial order, the trial judge ruled that:

"'Wilfully' as used in the indictment means intentionally, deliberately, voluntarily. If the Government proves defendant intentionally refused to comply with an order of his draft board, in accordance with the statute, to submit to induction, it is not open to defendant to offer as an excuse that he regarded the war as illegal, that is, contrary to either domestic Constitutional law or international law . . . in a prosecution for wilfully refusing to obey an induction order, evidence of belief is admissible only to the extent it bears upon the issue of intent as distinguished from motive or good faith." 194 F. Supp., at 519.

In the final arguments to the jury, just as in the opening statements, neither counsel mentioned a religious or nonreligious conscientious objector issue. The defense argued that the key to the case was whether Sisson had "wilfully" refused to submit to induction, and tried to suggest his beliefs about the war were relevant to this. The government lawyer simply pointed out the operative facts of Sisson's refusal. He also attacked Sisson's sincerity by pointing out the inconsistency between Sissons' broad statements that he opposed deferments because they discriminated against the poor, see n. 1 *supra*, and his willingness to accept a 2-S deferment while he was at Harvard College. (See App. 187-188.)

The instructions to the jury made no reference to a conscience objector claim, and the jury was not asked to find whether Sisson was "sincere" in his moral beliefs concerning the war. Instead the trial court told the jury that the crux of the case was whether Sisson's refusal to submit to induction was "unlawful, knowingly, and wilfully" done.<sup>4</sup> The jury, after deliberating about 20 minutes, brought in a verdict of guilty.

After the trial, the defendant made a timely motion under Fed. Rule Crim. Proc. 34 to arrest the judgment

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<sup>4</sup> The key instruction was given as follows:

"The only question which as a matter of law a Jury has a right to consider is whether the defendant, if he failed to perform an act required under the statute and regulations was acting knowingly in the sense of mental awareness, [and] wilfully in the sense of intentionally and with free choice.

"He may have all the views he likes of a political, ethical, religious or legal nature. They may be as reasonable as sometimes dissents of the Supreme Court are reasonable and sometimes the majority opinions are reasonable, but as long as the law stands as it now stands, his motivation, his good faith and the like are not in the least relevant to the question whether he is guilty or not." (App. 193.)



on the ground that the District Court lacked jurisdiction.<sup>5</sup> Pointing to the fact that the District Court had ruled before the trial that the political question doctrine prevented its consideration of defenses requiring an adjudication of the legality of the Vietnam War, the defense argued that the court therefore lacked jurisdiction under Article III and the Due Process Clause to try the defendant for an offense to which the illegality of the war might provide a defense.

The District Court, in granting what it termed a motion in arrest of judgment, did not rule on the jurisdictional argument raised in the defense motion. Instead, the court ruled on what it termed defendant's "older contention" <sup>6</sup> that the indictment did not charge

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<sup>5</sup> Defendant first submitted a motion in arrest of judgment March 26—five days after the trial. Two days later he substituted an amended motion in arrest "in lieu of" his original motion. This first amended motion differed only in detail from the original. Both were based on the jurisdictional argument described in the text and neither made any claim based on the Establishment or Free Exercise Clauses.

<sup>6</sup> The District Court was apparently referring to Sisson's pretrial "offer of evidence" with reference to Sisson's "right of conscience." See *supra*, at 4; 294 F. Supp., at 519. It does not appear that any contention based on Sisson's right of conscience was raised at trial, or made in the motion to arrest judgment, see *supra*, at n. 4. Possibly in recognition of this, the District Court noted in its opinion that "it would have been better practice" for Sisson's attorney to have made "a more detailed reference" in his motion in arrest to his "earlier" arguments. The court stated that "no doubt, defendant will reasonably make his motion in arrest clearer." On April 3—two days after the District Court's decision—Sisson's attorney moved to amend his motion in arrest to make the requested grounds conform with those already stated in the opinion. The District Court granted this motion to amend *nunc pro tunc* as of April 1—the date of its opinion.

Because we conclude that the District Court's decision was not in fact one arresting judgment, see *infra*, we have no occasion to decide whether the District Court incorrectly characterized these issues as having been raised by the defendant, and if so, whether

an offense based on defendant's "never abandoned" Establishment, Free Exercise, and Due Process Clause arguments relating to conscientious objections to the Vietnam War.

The court first stated the facts of the case, in effect making findings essential to its decision. The opinion describes how Sisson's demeanor on the stand convinced the court of his sincerity. The court stated that "Sisson's table of ultimate values is moral and ethical . . . [and] reflects quite as real, pervasive, durable and commendable marshalling of priorities as a formal religion." The critical finding for what followed was that:

"What another derives from the discipline of a church, Sisson derives from the discipline of conscience . . . . Sisson bore the burden of proving by objective evidence that he was sincere. He was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion."

Building on these findings, the court first held that the Free Exercise and Due Process Clauses "prohibit the application of the 1967 Draft Act to Sisson to require him to render combat service in Vietnam" because as a "sincerely conscientious man," Sisson's interest in not killing in the Vietnam conflict outweighed "the country's present need for him to be so employed." The District Court also ruled that § 6 (j) of the Selective Service Act, 50 U. S. C. App. § 456 (j), offends the Establishment Clause because it "unconstitutionally discriminates against atheists, agnostics, and men, like Sisson, who whether they be religious or not, are motivated in their

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the 1966 amendment to Fed. Rule Crim. Proc. 34, requiring that a motion in arrest of judgment be granted "on the motion of a defendant," precludes a district court from granting such a motion on an issue not raised by the defendant's motion.

objection to the draft by profound moral beliefs which constitute the central convictions of their beings."

## II

The Government bases its claim that this Court has jurisdiction to review the District Court's decision exclusively on the "arresting judgment" provision of the Criminal Appeals Act, 18 U. S. C. § 3731.<sup>7</sup> The relevant statutory language provides:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

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<sup>7</sup> For the text, see n. 20, *infra*.

It should be noted that at the conclusion of his opinion, the District Judge stated that he was granting the motion in arrest because "in the words of Rule 34, the indictment of Sisson 'does not charge an offense.'" He then stated in conclusory terms that his decision was one "arresting a judgment of conviction for insufficiency of the indictment . . . [which] is based upon the invalidity . . . of the statute upon which the indictment is founded" for purposes of 18 U. S. C. § 3731; and that the Government could therefore take a direct appeal to this Court.

The label attached by the District Court to its own opinion does not, of course, decide for us the jurisdictional issue, however. "We must be guided in determining the question of appealability not by the name the court gave [its decision] but by what in legal effect it actually was," *United States v. Waters*, 175 F. 2d 340, 341 (C. A. D. C. Cir.), appeal dismissed on Government's motion, 335 U. S. 869 (1948); *United States v. Zisblatt*, 172 F. 2d 740, 742 (C. A. 2d Cir.), appeal dismissed on Government's motion, 336 U. S. 934 (1949); see *United States v. Hark*, 320 U. S. 531, 536 (1944); *United States v. Blue*, 384 U. S. 251, 254 (1966).

Thus, three requirements must be met for this Court to have jurisdiction under this provision. First, the decision of the District Court must be one "arresting a judgment of conviction." Second, the arrest of judgment must be for the "insufficiency of the indictment or information." And third, the decision must be "based upon the invalidity or construction of the statute upon which the indictment or information is founded."<sup>8</sup>

Because the District Court's decision rests on facts not alleged in the indictment but instead inferred by the court from the evidence adduced at trial, we conclude that neither the first nor second requirement is met.<sup>9</sup>

#### A

We begin with the first requirement: was the decision below one "arresting a judgment of conviction?" In using that phrase in the Criminal Appeals Act, Congress did not, of course, invent a new procedural classification. Instead, Congress acted against a common-law background that gave the statutory phrase a well-defined and limited meaning. An arrest of judgment was the tech-

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<sup>8</sup> Although all three conditions must be met for the Government to appeal a case directly to this Court, as long as the first requirement is met the Government can appeal to a Court of Appeals under a separate provision of § 3731 allowing an appeal "[f]rom a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided . . . ."

<sup>9</sup> It is arguable that the third requirement is not met since the District Court's decision was not "based upon the invalidity or construction" of 50 U. S. C. App. § 462 (a)—the statutory provision "upon which the indictment . . . is founded." As a matter of sound construction, however, "statute upon which the indictment . . . is founded" should be read to include the entire statute, and not simply the penalty provisions. See *United States v. Socony Mobil Oil Co.*, 252 F.2d 420 (C. A. 1st Cir.), appeal dismissed per stipulation, 356 U. S. 925 (1958); cf. *United States v. Mersky*, 361 U. S. 431 (1960); see also Friedenthal, *Government Appeals in Federal Criminal Cases*, 12 Stan. L. Rev. 71, 75 (1959).

nical term describing the act of a trial judge refusing to enter judgment on the verdict because of an error appearing on the face of the record that rendered the judgment invalid. 3 Blackstone, Commentaries 393; 3 Stephen, Comm. 628 (1st Am. ed. 1845); 2 Bishops, New Criminal Procedure § 1285 (2d ed. 1913).

For the purpose of this case the critical requirement is that a judgment can be arrested only on the basis of error appearing on the "face of the record," and not on the basis of proof offered at trial.<sup>10</sup> This requirement can be found in early English common law cases. In *Sutton v. Bishop*, 4 Burrows 2283, 2287 (1769), it was stated: "The Court ought not to arrest judgments upon matters not appearing upon the face of the record but are to judge upon the record itself." Once transported to the United States,<sup>11</sup> this essential limitation of arrests of judgment was explicitly acknowledged by this Court. In *United States v. Klinton*, 5 Wheat. 144, 149 (1820), the Court stated that "judgment can be arrested only for errors apparent on the record." And later in *Bond v. Dustin*, 112 U. S. 604 (1884), the Court said, "[A] motion in arrest of judgment can only be maintained for a defect apparent upon the face of the record, and the evidence is no part of the record for this purpose," *id.*, at 608. See *Carter v. Bennett*, 15 How. 354, 356-357 (1853); *United States v. Norris*, 281 U. S. 619 (1930).

This venerable requirement of the common law has been preserved under the Federal Rules of Criminal Procedure, for the courts have uniformly held that in grant-

<sup>10</sup> In early days the "face of the record" simply included the material found on the "judgment roll." See *United States v. Zisblatt*, *supra*, 172 F. 2d, at 742. In a criminal case today it has been thought to include "no more than the indictment, the plea, the verdict . . . and the sentence." *United States v. Bradford*, 194 F. 2d 197, 201 (C. A. 2d Cir. 1952), cert. denied, 343 U. S. 979.

<sup>11</sup> This Court first recognized the existence of motions in arrest of judgment in *United States v. Cantrill*, 4 Cranch 167 (1807).



ing a motion in arrest of judgment under Rule 34,<sup>12</sup> a district court must not look beyond the face of the record. *E. g.*, *United States v. Zisblatt*, 172 F. 2d 740 (C. A. 2d Cir.), appeal dismissed on Government's motion, 336 U. S. 934 (1949); *United States v. Lias*, 173 F. 2d 685 (C. A. 4th Cir. 1949); *United States v. Bradford*, 194 F. 2d 197 (C. A. 2d Cir. 1952). See 2 Wright, Criminal Federal Practice and Procedure § 571 (1969); 5 Orfield, Criminal Procedure Under the Federal Rules § 34.7 (1967). Therefore, whether we interpret the statutory phrase "decision arresting judgment" as speaking "to the law, as it then was [in 1907] . . . as it came down from past,"<sup>13</sup> or do no more than interpret it as simply imposing the standards of Fed. Rule Crim. Proc. 34,<sup>14</sup> a decision based on evidence adduced at trial cannot be one arresting judgment.<sup>15</sup>

<sup>12</sup> Fed. Rule Crim. Proc. 34 provides:

"The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere*, or within such further time as the court may fix during the 7-day period."

<sup>13</sup> *United States v. Zisblatt*, *supra*, at 742.

<sup>14</sup> *United States v. Lias*, *supra*, at 687.

<sup>15</sup> None of the cases relied on by the Government even hints that evidence presented at the trial can be the basis for a motion in arrest of judgment. In *Green v. United States*, 350 U. S. 415 (1956), there was no disagreement between the majority and dissenters on the rule that direct review is impossible if the decision below is based upon facts arising from the trial. Instead the majority and dissent simply disagreed as to whether the District Court's decision *had* relied on evidence at the trial. Compare the majority opinion, 350 U. S., at 418 and 421, with the dissent, 350 U. S., at 421. In *United States v. Bramblatt*, 348 U. S. 503 (1955), also cited by the Government, the indictment specified that the appellee had made a fraudulent claim against the Disbursing Office

The court below clearly went beyond the "face of the record" in reaching its decision. As noted earlier, the opinion explicitly relies upon the evidence adduced at the trial, including demeanor evidence, for its findings that Sisson was "sincere" and that he was "as genuinely and profoundly governed by conscience" as a religious conscientious objector.

To avoid the inescapable conclusion that the District Court's opinion was not an arrest of judgment, the Government makes two arguments. First, the Government suggests that these factual findings of the District Court, based on the evidence presented at trial, were not essential to its constitutional rulings, but instead only part of "the circumstantial framework" of the opinion below. (Jurisdictional Statement, at 9; see Brief, at 8.)

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of the House of Representatives in violation of 18 U. S. C. § 1001 which forbids the willful falsification of any material statement "in any matter within the jurisdiction of any department or agency of the United States." The District Court arrested judgment on the ground that the House Disbursing Office was not a "department or agency" for purposes of the statute, and on appeal this Court reversed. Neither the District Court nor this Court relied in any way upon the evidence submitted at the trial in determining the scope of the statutory phrase "department or agency" found in 18 U. S. C. § 1001. Finally, the Government refers to *United States v. Waters*, 175 F. 2d 340 (C. A. D. C. Cir. 1948). In that case the District Court held an indictment did not charge an offense because it alleged only that the appellee was carrying a gun, and not that he was carrying a gun without a license. However, the District Court called its opinion the grant of a motion of acquittal. The United States appealed to the Court of Appeals which held that the decision was a motion in arrest, stating that the "question of appealability" turned not on "the name the [district] court gave [the decision] but by what in legal effect it actually was." The Court of Appeals then certified the case to this Court, since it felt the motion in arrest involved an "interpretation" of the underlying statute, but the appeal was dismissed on the motion of the United States, 335 U. S. 869 (1948).

This cannot withstand analysis, however, for the factual findings were absolutely essential, under the District Court's own legal theory, to its disposition of the case. Without a finding that Sisson was sincerely and fundamentally opposed to participation in the Vietnam conflict, the District Court could not have ruled that under the Due Process and Free Exercise Clauses Sisson's interest in not serving in Vietnam outweighed the Government's need to draft him for such service.<sup>16</sup>

Second, the Government argues that even though the District Court made findings on evidence adduced at trial, the facts relied on were "undisputed." Adopting the language used by the court below, the Government claims that "in substance the case arises upon an agreed statement of facts." 297 F. Supp. 904. The Government then goes on to argue that decisions of this Court have "recognized that a stipulation of facts by the parties in a criminal case" can be relied on by the District Court without affecting the jurisdiction for an appeal, citing *United States v. Halseth*, 342 U. S. 277 (1952), and *United States v. Fruehauf*, 365 U. S.

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<sup>16</sup> The factual determinations would also appear essential for the District Court's alternative ground of decision based on the Establishment Clause. That holding rests necessarily upon the finding that Sisson, though nonreligious, "was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion." Without this finding, Sisson would have no standing to assert the underinclusiveness of § 6 (j) of the Act as a defense to his prosecution. Whether factual determinations made only for purposes of deciding questions of standing, particularly if made before trial, would offend the requirements that motions in arrest must be based on errors on the face of the record is an issue inappropriate for decision in this case. Because of our determination that the District Court's free exercise holding was in effect an acquittal, there is no need to decide whether the alternative Establishment Clause ruling would be appealable if it stood alone.

146 (1961). The Government then concludes that it would be exalting form over substance to hold there was no appeal in a case where the Government has not contested the facts, and yet allow an appeal to lie from a motion to dismiss resting upon a stipulation of the parties.

Preliminarily, it should be noted that this Court has never held that an appeal lies from a decision which depends not upon the sufficiency of the indictment alone, but also on a stipulation of the parties. In *Halseth* the parties did enter into a stipulation for purposes of a motion to dismiss. But the facts in the stipulation were irrelevant to the legal issue of whether the federal anti-lottery statute reached a game not yet in existence. Therefore, neither the District Court in dismissing the indictment, nor this Court in affirming its decision, had to rely on the stipulation. And, for purposes of deciding whether jurisdiction for an appeal under § 3731 existed, the Court obviously did not have to decide—and it did not discuss—whether reliance on a stipulation would make any difference. — Insofar as *United States v. Fruehauf*, *supra*, the other case cited by the Government, is relevant at all it seems to point away from the Government's contention. In *Fruehauf* this Court refused to consider the merits of an appeal under § 3731 from a District Court decision dismissing an indictment on the basis of a "judicial admission" culled from a pre-trial memorandum of the Government by the District Judge. Rather than penalizing the Government by dismissing the appeal, however, the Court simply exercised its discretion under 28 U. S. C. § 2106 by setting aside the ruling below, and remanding the case for a new trial on the existing indictment.

Not only do the cases cited by the Government fail to establish its contention, but other authority points strongly in the opposite direction. In *United States v. Norris*, 281 U. S. 619 (1930), this Court said that a "stip-

ulation was ineffective to import an issue as to the sufficiency of the indictment, or an issue of fact upon the question of guilt or innocence," because of "the rule that nothing can be added to an indictment without the concurrence of the grand jury," *id.*, at 622. While it is true that *Norris* is complicated by the fact that defendant had entered a guilty plea, the Court said that even "if [the stipulation had been] filed before plea and [had been] given effect, such a stipulation would oust the jurisdiction of the court," *id.*, at 622-623. *Norris*, together with the policy, often expressed by this Court, that the Criminal Appeals Act should be strictly construed against the Government's right to appeal, see, *e. g.*, *United States v. Borden*, 308 U. S. 188, 192 (1939), make it at least very doubtful whether the parties should, on the basis of a stipulation, be able to secure review under the motion in arrest provisions of § 3731.

We do not decide that issue, however, for there was nothing even approaching a stipulation here. Before the court's final ruling below, the parties did not in any way, formally or informally, agree on the factual findings made in its opinion. It is relevant to recall that before the trial the government attorney specifically refused to stipulate whether *Sisson* sincerely believed the war to be illegal, and if so, whether such a belief was reasonable. Moreover, given that the government attorney cross-examined *Sisson*, and later pointed out the inconsistency between *Sisson's* acceptance of a 2-S undergraduate deferment and his claim that he disapproved of deferments as unfair, it hardly seems the Government accepted *Sisson's* sincerity insofar as it was an issue in the case. Therefore, far from being like a case with a formal stipulation between the parties, the most that can be said is that *after* the District Court's decision the Government chose to accept the opinion's findings of fact. Even assuming reliance on a formal stipulation were per-



missible, it would still be intolerable to allow direct review whenever the District Court labels its decision a motion in arrest, and the Government merely accepts the lower court's factual findings made after a trial—for this would mean the parties and the lower court simply could foist jurisdiction upon this Court.

### B

The second statutory requirement, that the decision arresting judgment be “for the insufficiency of the indictment,” is also not met in this case. Senator Nelson, one of the sponsors of the Criminal Appeals Act, made it plain during the debates that this second element was an important limitation. He said:

“The arrest of judgment . . . in which an appeal lies is not a general motion covering all grounds on which a judgment may be arrested. It is simply for arrest of judgment because of the insufficiency of the indictment—that is, *the failure of the indictment to charge a criminal offense.*” 41 Cong. Rec. 2756 (1907). (Emphasis supplied.) See also 40 Cong. Rec. 9033.

Although the District Court's opinion recites as a conclusion that the indictment in this case “did not charge an offense” for purposes of Rule 34, surely the indictment alleged the necessary elements of an offense.<sup>17</sup> The deci-

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<sup>17</sup> Compare 50 U. S. C. App. § 462 (a) (Supp. IV) with the allegations of the indictment:

“That on or about April 17, 1968, at Boston, in the District of Massachusetts, JOHN HEFFRON SISSON, JR., of Lincoln, in the District of Massachusetts, did unlawfully, knowingly, and wilfully fail and neglect and refuse to perform a duty required of him under and in the execution of the Military Selective Service Act of 1967 and the rules, regulations and directions duly made pursuant thereto, particularly 32 Code of Federal Regulations 1632.14, in that he did

sion below rests on affirmative defenses, which the court thought, Sisson could claim because of his beliefs. It has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses, *United States v. Fargas*, 267 F. Supp. 452, 455 (D. C. S. D. N. Y. 1967) ("Any questions as to the validity of the local board's refusal to grant conscientious objector exemption are matters of defence . . . [that] [t]here is no necessity for the indictment to negate . . ."). Moreover, even assuming arguendo the correctness of the District Court's constitutional theory that sincere nonreligious objectors to particular wars have a constitutional privilege that bars conviction, the facts essential to Sisson's claim of this privilege do not appear from any recitals in the indictment. As the District Court itself said before trial, "What [Sisson] believed is a question of evidence and not a question which appears on the face of the indictment." (App. 52.) In short, this indictment cannot be taken as insufficient for on the one hand, it recites the necessary elements of an offense and on the other hand, it does not allege facts which themselves demonstrate the availability of a constitutional privilege.

## C

The same reason underlying our conclusion that this was not a decision arresting judgment—i.e., that the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial—convinces us that the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty.

fail and neglect and refuse to comply with an order of his local draft board to submit to induction into the armed forces of the United States; in violation of Title 50, Appendix, United States Code, Section 462."

For purposes of analysis it is helpful to compare this case to one in which a jury was instructed as follows:

"If you find defendant Sisson to be sincere, and if you find that he was as genuinely and profoundly governed by conscience as a martyr obedient to an orthodox religion, you must acquit him because the government's interest in having him serve in Vietnam is outweighed by his interest in obeying the dictates of his conscience. On the other hand, if you do not so find, you must convict if you find that petitioner did willfully refuse induction."

If a jury had been so instructed, there can be no doubt that its verdict of acquittal could not be appealed under § 3731 *no matter how erroneous the constitutional theory underlying the instructions*. As Senator Knox said of the bill that was to become the Criminal Appeals Act:

"Mark this: It is not proposed to give the Government any appeal under any circumstances when the defendant is acquitted *for any error whatever committed by the court*. . . . The Government takes the risks of all the mistakes of its prosecuting officers *and of the trial judge in the trial*, and it is only proposed to give it an appeal upon questions of law raised by the defendant to defeat the trial and if it defeats the trial. The defendant gets the benefit of all errors in the trial which are in his favor, and can challenge all errors in the trial which are against him." 41 Cong. Rec. 2752 (1907).

Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution . . . . [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for

the same offense," *United States v. Ball*, 163 U. S. 662, 671 (1896).<sup>18</sup>

There are three differences between the hypothetical just suggested and the case at hand. First, in this case it was the judge—not the jury—who made the factual determinations. This difference alone does not support a legal distinction, however, for judges, like juries, can acquit defendants, see Fed. Rule Crim. Proc. 29. Second, the judge in this case made his decision *after* the jury had brought in a verdict of guilty. Rule 29 (c) and (d) of the Federal Rules of Criminal Procedure expressly allows, however, a federal judge to acquit a criminal defendant after the jury "returns a verdict of guilty." And third, in this case the District Court labeled his post-verdict opinion an arrest of judgment, not an acquittal. This characterization alone, however, neither confers jurisdiction on this Court, see n. 6, *supra*, nor makes the opinion any less dependent upon evidence adduced at the trial. In short, we see no distinction between what the court below did, and a post-verdict directed acquittal.<sup>19</sup>

<sup>18</sup> This principle would dictate that after this jurisdictional dismissal, *Sisson* may not be retried.

<sup>19</sup> Our conclusion does not, as suggested in dissent, *post* — (dissenting opinion of Mr. JUSTICE WHITE), rest on the fact the District Court "might have" sent the case to the jury on the instruction referred to in the text, but instead on what he did do—i. e., render a legal determination on the basis of facts adduced at the trial relating to the general issue of the case, see, *infra*, 31–32. Neither dissenting opinion explains what "large and critical" difference, *post*, —, exists between their expansive notions of what constitutes a decision arresting judgment and a post-verdict acquittal entered by the judge after the jury has returned a verdict of guilty pursuant to Fed. Rule Crim. Proc. 29.

We think untenable the view of Mr. JUSTICE WHITE that under the principles of this opinion today the "Court should not had taken jurisdiction in *United States v. Covington*," 395 U. S. 57 (1969), on the ground that the pretrial dismissal in that case "would

## III

The dissenting opinions of both THE CHIEF JUSTICE and MR. JUSTICE WHITE suggest that we are too niggardly in our interpretation of the Criminal Appeals Act, and each contends that the Act should be more broadly construed to give effect to an underlying policy which is said to favor review. This Court has frequently stated that the "exceptional right of appeal given to the Government by the Criminal Appeals Act is strictly limited to the instances specified," *United States v. Borden Co.*, 308 U. S. 188, 192 (1939), and that such appeals "are something unusual, exceptional, unfavored," *Carroll v. United States*, 354 U. S. 394, 399-400 (1957); see *United States v. Keitel*, 211 U. S. 370, 399 (1908); *United States v. Dickinson*, 213 U. S. 92, 103 (1909); cf. *Will v. United States*, 389 U. S. 90, 96 (1967). The approach suggested by our Brothers seems inconsistent with these notions. Moreover, the background and legislative history of the Criminal Appeals Act demonstrate the compromise origins of the Act that justify the principle of strict construction this Court has always said should be placed

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amount to an acquittal because the judge *might have* given the case to the jury under instructions that they should acquit if they found the facts necessary to sustain the defendant's privilege—*e. g.*, that he was not one of the registered marihuana dealers whose conduct was illegal under state law," *post.*, — (emphasis in original). As we note, *infra*, n. 56, what the District Court did do in *Covington* was to dismiss an indictment *before trial without any evidentiary hearing*. Moreover, in disposing of the Government's contentions on the merits, this Court held that there was no need in that case for a pretrial evidentiary hearing on the defendant's motion to dismiss (much less need to submit any factual issue to a jury) because (1) "there was no possibility of any factual dispute with regard to the hazard of incrimination"; and (2) "the Government [had] never alleged the existence of a factual controversy" concerning appellee's nonwaiver of his privilege against self-incrimination, 395 U. S., at 61.



on its provisions. Because the Criminal Appeals Act, now 18 U. S. C. § 3731,<sup>20</sup> has descended unchanged in substance from the original Criminal Appeals Act, which was enacted on March 2, 1907, 34 Stat. 1246,<sup>21</sup> the crucial

<sup>20</sup> The statute provides, in pertinent part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

The statute goes on to provide for (1) Government appeals to the courts of appeals for all other decisions (a) setting aside or dismissing indictments, or (b) arresting judgments; (c) granting a pretrial suppression motion; (2) release on bail according to 18 U. S. C. § 207; (3) transfer of cases from this Court to a court of appeals or vice versa when an appeal has erroneously been taken to the wrong court.

<sup>21</sup> 34 Stat. 1246 provided in pertinent part:

"... That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

focus for this inquiry must be the legislative history of the 1907 Act.<sup>22</sup>

## A

Beginning in 1892—15 years before the enactment of the Criminal Appeals Act—the Attorneys General of the United States regularly recommended passage of legislation allowing the Government to appeal in criminal cases.<sup>23</sup> Their primary purpose was perhaps best expressed by Attorney General Miller in his 1892 report: “As the law now stands . . . it is in the power of a single district judge, by quashing an indictment, to defeat any criminal prosecution instituted by the Govern-

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<sup>22</sup> Between 1907 and the present day, Congress has amended the Act several times. These include a 1948 amendment that brought the procedural vocabulary of the statute into formal conformity with the Federal Rules of Criminal Procedure, 62 Stat. 844. Although “special plea in bar” thus became “motion in bar,” and “decision . . . quashing . . . or sustaining a demurrer to, any indictment” became “decision . . . dismissing any indictment,” the Reviser’s Notes plainly show that this amendment was not meant to change the Act’s coverage, H. R. Rep. No. 304, 80th Cong., 1st Sess., A-177; see *United States v. Apex Distributing Co.*, 270 F. 2d 747, 755 (C. A. 9th Cir. 1959).

A 1942 amendment did increase this Court’s jurisdiction under the Act by including cases involving informations as well as indictments, 56 Stat. 271. Other amendments have (1) abolished review by writ of error and substituted the right of appeal, 45 Stat. 54 (1928); (2) given the courts of appeals jurisdiction for appeals from decisions in the same common-law categories as those originally provided, but which do not involve the construction or validity of the underlying statute, 56 Stat. 271 (1942).

<sup>23</sup> See the Attorney General’s Annual Reports for 1892, at xxiv-xxv; for 1893, at xxvi; for 1894, at xxix; for 1899, at 33; for 1900, at 40; for 1903, at vi; for 1905, at 10; for 1906, at 4. See generally, Kurland, *The Mersky Case and the Criminal Appeals Act: A Suggestion for Amendment of the Statute*, 28 U. Chi. L. Rev. 419, 446-449 (1961); F. Frankfurter and J. Landis, *The Business of the Supreme Court*, 114-117.

ment."<sup>24</sup> There was no progress, however, until President Theodore Roosevelt, outraged by a decision of Judge Humphrey preventing the prosecution of the Beef-Trust,<sup>25</sup> made this proposed reform into a "major political issue,"<sup>26</sup> and demanded the enactment of legislation in his 1906 annual message to Congress.<sup>27</sup>

The House, as one commentator has written, "was obedient to the presidential command."<sup>28</sup> It passed, without debate,<sup>29</sup> a very broad bill giving the Government the same right to appeal legal issues decided adversely to it as had earlier been accorded a criminal defendant.<sup>30</sup> The Senate would not accept any such sweeping change of the traditional common-law rule giving the Government no appeal at all. The substitute bill that the Senate Judiciary Committee reported out<sup>31</sup> narrowed the House bill substantially, and limited the Government's right to appeal to writs of error from decisions (1) quashing an indictment or sustaining a demurrer to an indictment; (2) arresting judgment of conviction because of the insufficiency of the indictment; and (3) sustaining special pleas in bar when the defendant had not been put in jeopardy. Even as narrowed,

<sup>24</sup> 1892 Rep. Atty. Gen. xxiv.

<sup>25</sup> *United States v. Armour & Co.*, 142 F. 808 (D. C. N. D. Ill. 1906).

<sup>26</sup> See Frankfurter & Landis, *supra*, at 117; Kurland, *supra*, at 449.

<sup>27</sup> 41 Cong. Rec. 22 (1906).

<sup>28</sup> Kurland, *supra*, at 450.

<sup>29</sup> 40 Cong. Rec. 5408 (1906).

<sup>30</sup> The text of the House bill appears at 40 Cong. Rec. 5408. It gave the United States the same right of review by writ of error as was then accorded a criminal defendant, but further provided that if on appeal any error were found, the defendant should retain the advantage of any verdict in his favor. With neither debate nor a division, the bill passed the House on April 17, 1906. *Id.*, at 5408.

<sup>31</sup> See S. Rep. No. 3922, 59th Cong., 1st Sess., Ser. No. 4905.

the bill met opposition on the floor,<sup>32</sup> and the session closed without Senate action.<sup>33</sup>

The next session, after the bill was again reported out of the Senate Judiciary Committee,<sup>34</sup> it was debated for three days on the floor and again met strong opposition.<sup>35</sup> Reflecting the deep concern that the legislation not jeopardize interests of defendants whose cases were appealed by the Government, amendments were adopted requiring the Government to appeal within 30 days and to prosecute its cases with diligence;<sup>36</sup> and allowing defendants whose cases were appealed to be released on their own recognizance in the discretion of the presiding judge.<sup>37</sup> Various Senators were particularly concerned lest there be any possibility that a defendant who had already been through one trial be subjected to another trial after a successful appeal by the Government.<sup>38</sup> In response to this concern, an amendment was then adopted requiring that verdicts in favor of the defendant not be set aside on appeal<sup>39</sup> no matter how erroneous the legal theory upon which it might be based.<sup>40</sup> For these purposes, it was made plain that it made no difference whether the verdict be the result of the jury's decision or that of the judge.<sup>41</sup> Moreover, as we explore in more detail later,

<sup>32</sup> See 40 Cong. Rec. 9033.

<sup>33</sup> *Id.*, at 9122.

<sup>34</sup> 41 Cong. Rec. 1865; S. Rep. No. 5650, 59th Cong., 2d Sess., Ser. No. 5060.

<sup>35</sup> 41 Cong. Rec. 2190-2197; 2744-2763; 2818-2825.

<sup>36</sup> *Id.*, at 2194.

<sup>37</sup> *Id.*, at 2195-2197.

<sup>38</sup> See, *id.*, at 2749-2762.

<sup>39</sup> See, *id.*, at 2819.

<sup>40</sup> See, *id.*, at 2752.

<sup>41</sup> When asked whether the substance of his amendment was that there was to be no appeal and retrial after the defendant had been "acquitted by the verdict of a jury," the sponsor of the amendment, Senator Rayner, stated: "I have in the amendment no such words

the debates suggest that apart from decisions arresting judgment, there were to be no appeals taken in any case in which jeopardy had attached by the empaneling of the jury.<sup>42</sup> Finally, to limit further the scope of the Act to cases of public importance, the Government's right to appeal (under all but the special plea in bar provision) was confined to cases in which the ground of the District Court's decision was the "invalidity or construction of the statute upon which the indictment was founded."<sup>43</sup>

With all these amendments the Senate passed the bill without division on February 13, 1907,<sup>44</sup> but the House, after referring the Senate's version to its Judiciary Committee,<sup>45</sup> disagreed with the Senate bill and proposed a conference.<sup>46</sup> The conference committee, apart from divesting the courts of appeals from jurisdiction to hear any appeals, adopted the Senate version of the bill with merely formal changes.<sup>47</sup> Both the Senate and the House approved the bill reported out by the Conference,<sup>48</sup> and with the President's signature the Criminal Appeals Act became law.

## B

With this perspective, we now examine the arguments made in opposition to our conclusion. It is argued in dissent that § 3731 "contemplates that an arrest of judgment is appropriate in other than a closed category of cases defined by legal history," and concludes that "evi-

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as 'acquitted by the jury.' I have nothing to do with the jury. He may be acquitted by a magistrate . . . . I do not care by what tribunal he is acquitted . . . ." *Id.*, at 2749.

<sup>42</sup> See *infra*, at 33-38.

<sup>43</sup> See 41 Cong. Rec., at 2822, 2823.

<sup>44</sup> *Id.*, at 2834.

<sup>45</sup> *Id.*, at 3044-3047.

<sup>46</sup> *Id.*, at 3647.

<sup>47</sup> See H. R. Rep. No. 8113, 59th Cong., 2d Sess., Ser. No. 5065.

<sup>48</sup> 41 Cong. Rec. 3994, 4128.



dence adduced at trial can be considered by a district court as the basis for a motion in arrest of judgment when that evidence is used solely for the purpose of testing the constitutionality of the charging statute as applied," *post* — (dissenting opinion of THE CHIEF JUSTICE).

The dissenters propose in effect to create a new procedure—label it a decision arresting judgment—in order to conclude that this Court has jurisdiction to hear this appeal by the Government. The statutory phrase "decision arresting judgment" is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes. As we have shown, Congress defined our jurisdiction in the Criminal Appeals Act in terms of procedures existing in 1907. As a matter of interpretation, this Court has no right to give the statutory language a meaning inconsistent with its common-law antecedents, and alien to the limitations that today govern motions in arrest of judgment under Rule 34.<sup>40</sup>

Radical reinterpretations of the statutory phrase "decision arresting judgment" are said to be necessary in order to effectuate a broad policy, found to be underlying the Criminal Appeals Act, that this Court review important legal issues. The axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed. Care must be taken, however, to respect the limits to which Congress was prepared to enact a particular policy, especially when the boundaries of a statute are drawn as a com-

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<sup>40</sup> It appears that the dissenters have not only "outgrown" the statutory limitations of a "decision arresting judgment" for purposes of § 3731, but also the limitations of Rule 34.

promise resulting from the countervailing pressures of other policies. Our disagreeing Brothers, in seeking to energize the congressional commitment to review, ignore the subtlety of the compromise that limited our jurisdiction, and garnered the votes necessary to make the Criminal Appeals Act into the law.<sup>50</sup>

In this regard, the legislative history reveals a strong current of congressional solicitude for the plight of a criminal defendant exposed to additional expense and anxiety by a government appeal and the encumbent possibility of multiple trials. Criminal appeals by the Government "always threaten to offend the policies behind the double-jeopardy prohibition," *United States v. Will, supra*, at 96, even in circumstances where the Constitution itself does not bar retrial. Out of a collision between this policy concern, and the competing policy favoring review, Congress enacted a bill that fully satisfied neither the Government nor the bill's opponents.<sup>51</sup> For the Criminal Appeals Act, thus born of compromise, it was congressional policy to provide review in certain instances but no less congressional policy to restrict it to the enumerated instances.

Were we to throw overboard the ballast provided by the statute's language and legislative history, we would cast ourselves adrift, blind to the risks of collision with other policies that are the buoys marking the safely navigable zone of our jurisdiction. As we have shown, what the District Court did in this case cannot be distinguished from a post-verdict acquittal entered on the

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<sup>50</sup> Professor Kurland characterized the statute as "a compromise among several divergent forces. The division in the Senate was primarily between those who wanted limited review and those who wanted none. The division between the House and Senate was between those who wanted complete review and those who wanted limited review." Kurland, *supra*, at 454.

<sup>51</sup> See, e. g., Rep. Atty. Gen. (1907), p. 4. See *infra*, at 36-37.

ground that the Government did not present evidence sufficient to prove that Sisson was insincere. A primary concern of the bill that emerged into law was that no appeal be taken by the Government from an acquittal no matter how erroneous the legal theory underlying the decision. Moreover, going beyond the present case, the theory of those in disagreement would allow a trial judge to reserve to himself the resolution of disputes concerning facts underlying a claim that in particular circumstances a speech or protest march were privileged under the First Amendment, a practice plainly inconsistent with a criminal defendant's jury trial rights.

## C

Quite apart from the arresting judgment provision, it is also argued that we have jurisdiction under the "motion in bar" provision of the Criminal Appeals Act. We think it appropriate to address ourselves to this contention, particularly in light of the fact that we asked the parties to brief these issues,<sup>52</sup> even though our holding that the decision below was an acquittal is sufficient to dispose of the case.

The case law under the motion-in-bar provision is very confused,<sup>53</sup> and this Court has not settled on a general

<sup>52</sup> See 396 U. S. 812 (1969).

<sup>53</sup> At common law, a special plea in bar was ordinarily used to raise three defenses—*autrefois acquit*, *autrefois convict*, and pardon—and there is language in some of our cases which indicates that, apart from these defenses, a plea in bar was not appropriate "to single out for determination in advance of trial matters of defense either on questions of law or fact," *United States v. Murdock*, 284 U. S. 141, 151 (1931). There are cases consistent with the narrow common-law definition that indicate, for example, that a defense based upon the statute of limitations could not be raised by a "special plea in bar," *United States v. Kissel*, 218 U. S. 601, 610 (1910); *United States v. Barber*, 219 U. S. 72, 78-79 (1911). On the other hand, it appears the Court accepted jurisdiction under

approach to be taken in interpreting this provision.<sup>54</sup> Even under the most expansive view, however, a motion in bar cannot be granted on the basis of facts which would necessarily be tried with the general issue in the case.<sup>55</sup> In this case, there can be no doubt that the District Court based his findings on evidence presented in the trial of the general issue. As we have shown earlier, the court's findings were based on Sisson's

§ 3731, in appeals from decisions granting special pleas in bar based on a statute of limitations defense, with no explanation of the apparent inconsistency. See *Goldman v. United States*, 277 U. S. 229, 236-237 (1928); see also *United States v. Rabinowich*, 238 U. S. 78 (1915). And, in *United States v. Mersky*, 361 U. S. 431 (1960), there was no decision of the Court on what was a motion in bar, and the concurring opinion of Mr. JUSTICE BRENNAN and the dissenting opinion of Mr. JUSTICE STEWART indicated disagreement on this issue. Compare 361 U. S. 441-443 with *id.*, at 455-458. To add to the uncertainty, arguably in *United States v. Murdock*, *supra*, and certainly in *United States v. Blue*, 384 U. S. 251, 253-254 (1966); and *United States v. Covington*, 395 U. S. 57, 59, at n. 2, the Court took jurisdiction and considered the merits of appeals from district court dismissals based on self-incrimination defenses on the ground that the decisions below had sustained motions in bar for purposes of the Criminal Appeals Act—even though *Murdock* itself stated that this defense is not appropriately raised by a special plea in bar. 284 U. S., at 151.

<sup>54</sup> In *United States v. Mersky*, 361 U. S. 431 (1960), there was no decision of the Court concerning what approach should be taken. Mr. JUSTICE BRENNAN suggested that the category include any decision that barred reprosecution if upheld, *id.*, at 441-443, while Mr. JUSTICE STEWART thought the provision should be confined to those decisions which would fall within the compass of the common law "special plea in bar," *id.*, at 455-458. See generally, Kurland, *The Mersky Case and the Criminal Appeals Act: A Suggestion for Amendment of the Statute*, 28 U. Chi. L. Rev. 419 (1961).

<sup>55</sup> The dismissal provision of Fed. Rule Crim. Proc. 12, which Mr. JUSTICE BRENNAN in his *Mersky* concurrence saw as having "swept away the old pleas," 361 U. S., at 442, itself limits a dismissal to those defenses "capable of determination without the trial of the general issue," Fed. Rule Crim. Proc. 12 (b)(1).



testimony and demeanor at the trial itself. Moreover, a defense based on Sisson's asserted constitutional privilege not to be required to fight in a particular war would, we think, necessarily be part of the "general issue" of a suit over a registrant's refusal to submit to induction. As THE CHIEF JUSTICE says in his dissenting opinion, "establishing the appropriate classification is actually an element of the Government's case," *post*, —, once a defendant raises a defense challenging it. We think a defense to a preinduction suit based on conscientious objections which requires factual determinations is so intertwined with the general issue that it must be tried with the general issue, *United States v. Fargas*, 267 F. Supp. 455 (pretrial motion to dismiss under Rule 12 (b)(1) on the basis of an affidavit, denied because "the validity of the [conscientious objector] defense which *Fargas* now raises . . . will require the consideration of factual issues which are embraced in the general issue"); see *United States v. Ramos*, 413 F. 2d 743, 744 n. 1 (C. A. 1st Cir. 1969) (evidentiary hearing for pretrial motion to dismiss indictment not appropriate means to consider validity of defense based on conscientious objection because "[q]uestions regarding the validity of appellant's classification should have been raised as a defense at the trial" citing *Fargas* with approval).<sup>56</sup>

<sup>56</sup> Nowhere does *Covington v. United States*, *supra*, suggest, as argued in dissent, that there might be jurisdiction under the motion-in-bar provision of 3731 in circumstances where the parties "tr[ie]d facts to the judge which were relevant to the motion in bar, and separate from the general issue," *post*, — (dissenting opinion of MR. JUSTICE WHITE). Our Brother WHITE reaches this conclusion by taking a quotation from *Covington* out of context, and confusing that opinion's disposition of the merits of the Government's appeal with the Court's jurisdictional holding.

In *Covington*, the district court, *before trial without any evidentiary hearing*, dismissed an indictment bottomed on the Marihuana Tax Act, 26 U. S. C. § 4744 (a) (1), on the ground that the "privilege against self-incrimination would provide a complete defense to the



There is, in our view, still another reason no appeal can lie in this case under the motion-in-bar provision. We construe the Criminal Appeals Act as confining the Government's right to appeal—except for motions in

prosecution," *id.*, at 58. The Government appealed, claiming the Court had jurisdiction under both the dismissal and the motion-in-bar provisions of § 3731. The Court found jurisdiction in the alternative under either provision. The only discussion of the motion in bar jurisdictional issue, found in a footnote, was as follows: "If the dismissal rested on the ground that the Fifth Amendment privilege would be a defense, then the decision was one 'sustaining a motion in bar.' See *United States v. Murdock*, 284 U. S. 141 (1931)," 395 U. S., at 59 n. 2.

Having thus disposed of the jurisdictional issue, the Court proceeded to the merits of the Government's appeal and, *inter alia*, considered "whether such a plea of the privilege [against self-incrimination] may ever justify dismissal of an indictment, and if so whether this is such an instance," *id.*, at 60. In this context the Court said:

"Federal Rule Criminal Procedure 12 (b) (1) states that: 'Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.' A defense is thus 'capable of determination' if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense. Rule 12 (b) (4) allows the District Court in its discretion to postpone determination of the motion to trial, and permits factual hearings prior to trial if necessary to resolve issues of fact peculiar to the motion." *Id.*, at 60.

Taken in full context, the quotation used by MR. JUSTICE WHITE, *post*, —, plainly had reference to a district court's power under Fed. Rule Crim. Proc. 12 to dismiss an indictment, and nothing whatsoever to do with the quite distinct issue of the scope of the jurisdictional provisions of § 3731.

That the Court was there concerned with only the merits of appeal is clear from what follows. After suggesting that in most circumstances a motion to dismiss an indictment brought under § 4744 would not require any factual inquiry, the Court stated that once a defendant asserted his privilege that a trial court should dismiss the indictment without an evidentiary hearing "unless the Government can rebut the presumption (of nonwaiver of the privilege) by showing a need for further factual inquiry." In applying that principle

arrest of judgment—to situations in which a jury has not been empaneled, even though there are cases in which a defendant might constitutionally be retried if appeals were allowed after jeopardy had attached. Because the court below rendered its decision here after the trial began, and because that decision was not, as we have shown, an arrest of judgment, we therefore conclude there can be no appeal under the other provisions of § 3731.

We reach this conclusion for several reasons. First, although the legislative history is far from clear, we think it was the congressional expectation that except for motions in arrest—which as we have shown could never be based on evidence adduced at trial—the rulings to which the bill related would occur before the trial began.<sup>57</sup> The language of the motion-in-bar provision

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to the merits of the case before, the Court affirmed the district court's action below because: (1) there [was] no possibility of any factual dispute with regard to the hazard of incrimination"; and (2) "the Government has never alleged the existence of a factual controversy" concerning the issue of whether "appellee had waived his privilege." *Id.*, at 61.

The Court in *Covington* did not say that a defense based on the privilege against self-incrimination where there were facts in dispute could, in all cases, be decided without consideration of the general issue. And, more importantly for present purposes, nowhere does the opinion in *Covington* even hint that a dismissal requiring a pre-trial evidentiary hearing, or a dismissal motion properly deferred to the trial of the general issue would be appealable under the motion-in-bar provisions of the Criminal Appeals Act. The Court in *Covington* had no such jurisdictional issues before it, and the opinion does not discuss such issues.

<sup>57</sup> See 40 Cong. Rec. 9033 (1906). In this exchange, Senator Spooner said: "I understand this [bill] applies only to questions which arise before the impaneling of the jury." Senator Nelson agreed that the bill was no limited, and obviously thinking he was saying the same thing, said the bill applied only "Where a party has not been put in jeopardy." After being reminded of the arresting judgment provision, Senator Nelson acknowledged that this was an exception, but obviously trying to minimize the scope of the exception he pointed out that the only motions in arrest of

itself limits appeals to those granted "when the defendant has not been put in jeopardy." We read that limitation to mean exactly what it says—i. e., no appeal from a motion in bar granted after jeopardy attaches. Although the legislative history shows much disagreement and confusion concerning the meaning of the constitutional prohibition against subjecting a defendant to double jeopardy<sup>58</sup> there was little dispute over the then settled notion that a defendant was put into jeopardy once the jury was sworn.<sup>59</sup> To read this limitation as

judgment that could be appealed were those granted "for insufficiency of the indictment; not for any other ground." 40 Cong. Rec. 9033.

See 41 Cong. Rec. 2191 (Sen. Nelson) ("I wish to say further that where a jury has been impaneled and where the defendant has been tried, an appeal does not lie"), *id.*, at 2748 (Sen. Patterson) ("a motion in arrest of judgment . . . is the only one of the three cases in which there can have been a trial . . . in the other two cases . . . the motions must *ex necessitati* be made before jeopardy attaches"); *id.*, at 2752 (Sen. Patterson) ("these proceedings are all defendant's acts *before a verdict* to prevent a trial, except the motion in arrest of judgment, which is defendant's act *after verdict* against him to defeat a verdict against him") (emphasis supplied).

Without explaining his inconsistency, Senator Patterson later expressed the view that under the proposed bill the Government would have been able to appeal the decision in the famed *Chicago Beef Trust* case because the jury's verdict was based on the "special plea in bar filed in that case," not on the defendant's guilt or innocence, *id.*, at 2753. Underlying this conclusion—later disputed by Senator Nelson, see, *id.*, at 2757—was Patterson's expectation that "in a case of a special plea of bar that when against the Government the Defendant had not been put in jeopardy *on the merits of the case*," *id.*, at 2753. Unlike the defendants in the *Beef Trust* case—who Patterson understood not to have been tried on the general issue of their guilt or innocence—plainly Sisson has been "put in jeopardy *on the merits of the case*." Our Brother WHITE admits as much, by suggesting he could not be retried. Therefore, even under Patterson's broader reading of the statute, an appeal would not lie in this case.

<sup>58</sup> See, e. g., 41 Cong. Rec. 2745-2763.

<sup>59</sup> See, e. g., 40 Cong. Rec. 9033; 41 Cong. Rec. 2192; *id.*, at 2751.

no more than a restatement of the constitutional prohibition, as suggested by MR. JUSTICE WHITE, renders it completely superfluous. No Senator thought that Congress had the power under the Constitution to provide for an appeal in circumstances in which that would violate the Constitution.<sup>60</sup>

Our conclusion draws strength from the fact that the Government itself has placed exactly this same interpretation on the Act. The Department of Justice, the agency for whose benefit the original bill was enacted, first placed this construction on the statute shortly after the bill was enacted, and has consistently abided by it in the more than 60 years that have since passed. As the Solicitor General stated in his brief:

"The Department of Justice has consistently taken the view that the plea in bar section limits the government's right of appeal to the granting of such pleas before a jury has been sworn. Soon after passage of the original Act, the 1907 Report of the Attorney General urged that the omission in the Act of a governmental right to appeal from post-jeopardy rulings be remedied by revising the Act so as to require counsel for the defendant to raise and

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<sup>60</sup> See 41 Cong. Rec. 2751 (Sen. Knox) ("[I]f I thought there was a single line, or a sentence, or a clause contained in this bill which by any court would be construed to place a man twice in jeopardy, I would cut it out, not because there would be any necessity for cutting it out, as it would be invalid under the Constitution of the United States, but I would vote to cut it out upon the ground that it would not be an artistic and intelligent bill with such a provision within its borders.")

The provision granting an appeal from a decision dismissing or setting aside an indictment does not contain a similar phrase limiting appeals to cases when the defendant has not yet been put in jeopardy, but we agree with the conclusion reached by the Government that the same limitation applies. See n. 57, *supra*.



argue questions of law prior to the time when jeopardy attached," Brief, at 17.

Later, after describing the opinion in *Zisblatt, supra*, in which the Second Circuit certified an appeal to this Court to determine whether the phrase "not been put in jeopardy" merely incorporated the constitutional limitation, or instead should be taken literally, the Government's brief states:

"The then Solicitor General, being of the view that the statute barred appeals from the granting of motions in bar after jeopardy had attached, moved to dismiss the appeal, and the appeal was dismissed (336 U. S. 934). The Department of Justice has thereafter adhered to that position, and the government has never sought to appeal in these circumstances." <sup>61</sup>

This interpretation deserves in our view great weight.

In light of (1) the compromise origins of the statute, (2) the concern with which some Senator viewed the retrial of any defendant whose trial terminated after the jury was empaneled, and (3) the interpretation placed on the Act shortly after its passage <sup>62</sup> that has been consistently followed for more than 60 years by the Government, we think that the correct course is

<sup>61</sup> Brief, at 19. It should be noted that at the Government's request a proposed amendment to § 3731 has been introduced in Congress to remove this limitation. The proposed statute, which avoids common-law terminology, would allow an appeal from a decision made after the jury was sworn in all cases where the Double Jeopardy Clause would permit it. See H. R. Rep. 14588, 91st Cong., 1st Sess., — Cong. Rec. No. 10274 (daily ed. Oct. 29, 1969).

<sup>62</sup> See 1907 Rep. Atty. Gen., at 4; see also Hearings on Granting Appeals by the United States from Decisions Sustaining Motions to Suppress Evidence before Subcommittee No. 2 of House Committee on the Judiciary, 83 Cong., 2d Sess., 11 (1954).



to construe the statute to provide a clear, easily administered test: except for decisions arresting judgment, there can be no government appeals from decisions rendered after the trial begins.

#### IV

Clarity is to be desired in any statute, but in matters of jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case. When judged in these terms, the Criminal Appeals Act is a failure. Born of compromise, and reflecting no coherent allocation of appellate responsibility,<sup>63</sup> the Criminal Appeals Act proved a most unruly child that has not improved with age. The statute's roots are grounded in pleading distinctions that existed at common law but that in most instances, fail to coincide with the procedural categories of the Federal Rules of Criminal Procedure. Not only does the statute create uncertainty by its requirement that one analyze the nature of the decision of the District Court in order to determine whether it falls within the class of common-law distinctions for which an appeal is authorized,<sup>64</sup> but it has also engendered confusion over the court to which an appealable decision should be brought.<sup>65</sup>

The Solicitor General, at oral argument in this case, forthrightly stated that "there are few problems which occur so frequently or present such extreme technical

<sup>63</sup> Motions in bar, for example, can only be appealed to this Court irrespective of whether the case involves the validity or construction of a statute.

<sup>64</sup> See *supra*, nn. 53-54.

<sup>65</sup> See, e. g., *United States v. Zisblatt*, *supra*; *United States v. Brodson*, 234 F. 2d 97 (C. A. 7th Cir. 1956). See generally, *Friedenthal*, *supra*, at 83-88.

difficulty in the Solicitor General's office [as] in the proper construction of the Criminal Appeals Act."<sup>66</sup> We share his dissatisfaction with this statute. Nevertheless, until such time as Congress decides to amend the statute, this Court must abide by the limitations imposed by this awkward and ancient Act.

We conclude that the appeal in this case must be dismissed for lack of jurisdiction.

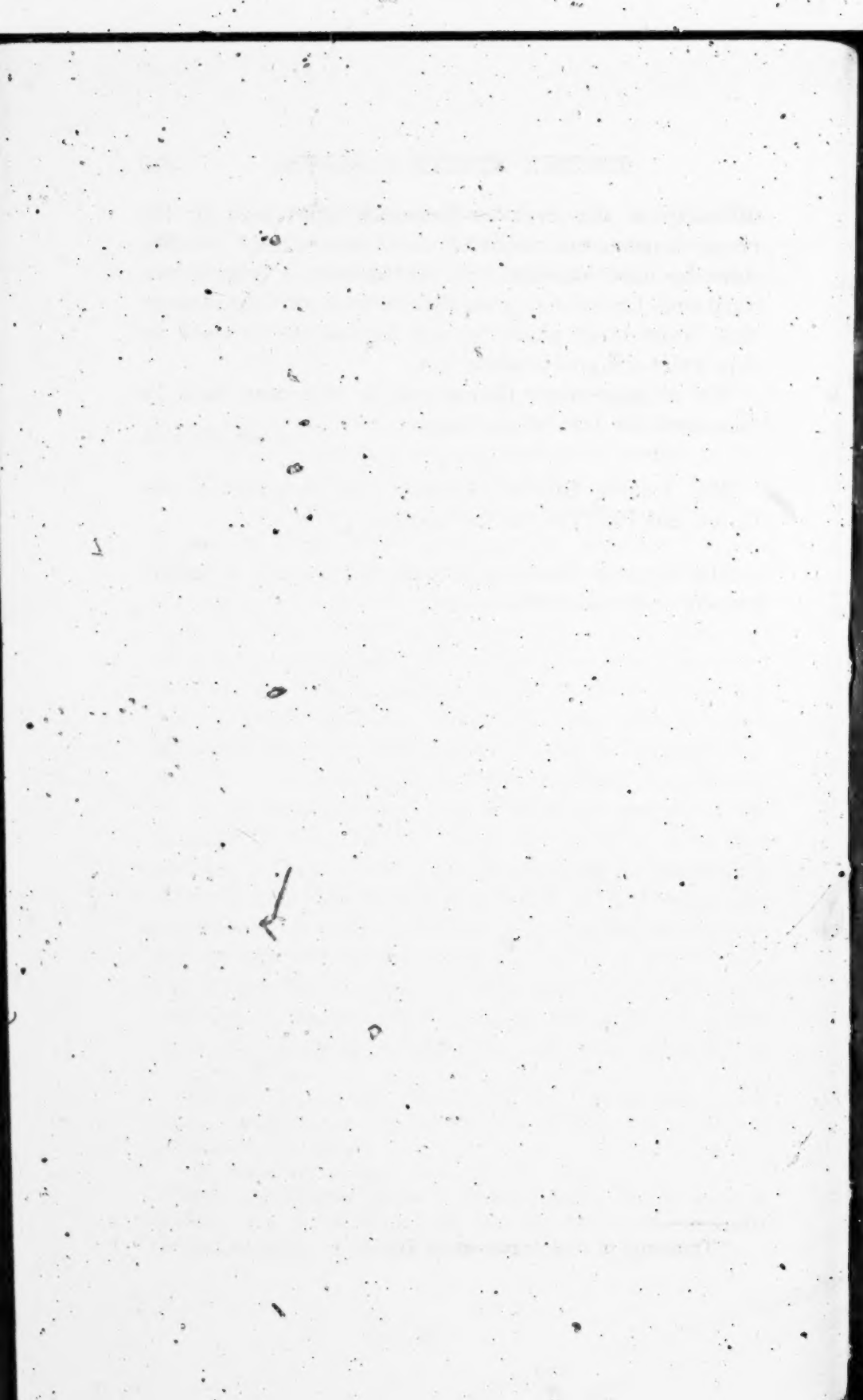
*It is so ordered.*

MR. JUSTICE BLACK concurs in the judgment of the Court and Part IIC of the opinion.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

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<sup>66</sup> Transcript of Oral Argument, at 11.



# SUPREME COURT OF THE UNITED STATES

No. 305.—OCTOBER TERM, 1969

United States, Appellant, } On Appeal From the United  
v. } States District Court for the  
John Heffron Sisson, Jr. } District of Massachusetts.

[June 29, 1970]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE join, dissenting.

Both the Government and Sisson have argued that this Court has jurisdiction to review the District Court's action by virtue of the "arrest of judgment" clause in the Criminal Appeals Act, 18 U. S. C. § 3731, which provides for a direct appeal to this Court

"[f]rom a decision [1] arresting a judgment of conviction [2] for insufficiency of the indictment or information, [3] where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

In rejecting the arguments of the parties the Court holds that we have no jurisdiction to hear this appeal, opting for the view that the "arrest of judgment" clause carries with it all of its common law antecedents and that the present case does not meet the criteria required by the common law. My disagreement with the Court's result and rationale is prompted by a fundamental disagreement with the Court's mode of analysis and its excessive reliance on ancient practices of Common Law England long superseded by Acts of Congress.

Section 3731 appears to set three requirements for jurisdiction in this Court: (1) the decision from which the appeal is taken must be one "arresting a judgment of conviction"; (2) the decision must be engendered by the "insufficiency of the indictment or information"; and (3) it must be "based on the invalidity or construction

of the statute upon which the indictment or information is founded."

I.

The first requirement, that the decision from which the appeal is taken must be one "arresting a judgment of conviction," can without undue violence to its language be construed as being encrusted with the lore of centuries of common law jurisprudence, and the Court has so construed it. The form of an "arrest of judgment" was well established at an early date in the common law's development; Blackstone was able to describe a clearly defined motion in arrest as a device which was procedurally appropriate after the guilty verdict had been rendered but before the judge had imposed sentence. The court, in an early form of permitting allocution, traditionally asked the prisoner if he had "anything to offer why judgment should not be awarded against him." 4 Blackstone, Commentaries \*375. The prisoner could then respond by offering exceptions to the indictment, "as for want of sufficient certainty in setting forth either the person, the time, the place, or the offense." *Ibid.* If the prisoner was successful, the court entered an arrest or stay of the judgment. Also, under the common law, it was settled that "the Court ought not to arrest judgments upon matters not appearing upon the face of the record; but are to judge upon the record itself, that their successors may know the grounds of their judgment." *Sutton v. Bishop*, 4 Burrows 2283, 2287, 98 Eng. Rep. 191 (K. B. 1769) (emphasis added). The record included "nothing more than the judgment roll; and indeed, the common-law knew nothing of the evidence taken at a trial until the Statute of Westminster allowed exceptions to be sealed and a bill of exceptions to be brought up with the roll on writ of error." *United States v. Zissblatt*, 172 F. 2d 740, 741-742 (C. A. 2d Cir.) (L. Hand, C. J.), *appeal dismissed on Government's motion*, 336 U. S. 934 (1949).



Much, if not all, of the common law learning was transplanted to the United States. As early as 1807, the Court recognized the existence of the motion in *United States v. Cantrill*, 4 Cranch 167 (1807). And, in 1820, Chief Justice Marshall stated for the Court that "judgment can be arrested only for errors apparent on the record . . . ." *United States v. Klintock*, 5 Wheat. 144, 149 (1820). See also *Carter v. Bennett*, 15 How. 354 (1853); *Bond v. Dustin*, 112 U. S. 604 (1884).

Whether § 3731's requirement of an arrest of judgment either incorporates the common law jurisprudence, or whether it is viewed as simply looking to the standards of Rule 34, Fed. Rules Crim. Proc.,<sup>1</sup> the Court has indicated that it believes that the decision of the District Court here was not one "arresting a judgment" because it was based on evidence adduced at the trial, notwithstanding the precise—and I suggest, purposeful, delineations of an astute district judge quite as familiar with history and the background of this statute as are we.

The Solicitor General also has conceded that § 3731 uses the term "arrest of judgment" in its common law sense. However, he has sought to avoid the inescapable implications of this concession by arguing that the District Court, "in granting appellee's motion, did not base its action wholly on the allegations of the indictment, but used as a partial predicate for its constitutional rulings the undisputed fact, which appeared from the evi-

<sup>1</sup> *United States v. Lias*, 173 F. 2d 685 (C. A. 4th Cir. 1949), supports the view that the standards are the same for Rule 34 and § 3731.

Rule 34 provides: "The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere*, or within such further time as the court may fix during the 7-day period."

dence at trial, that appellee is a nonreligious conscientious objector to participation in the Vietnam conflict."<sup>2</sup> The Solicitor General's argument in favor of jurisdiction seeks to avoid the District Court's reliance on evidence by pointing out that the District Court's decision did not purport to be a judgment on the merits, i. e., that the evidence was not sufficient to show that appellee committed the offense charged, and thus was not a directed acquittal. He submits that the District Court used Sisson's sincere, nonreligious form of conscientious objection to a particular war as the basis for its ruling that the indictment was constitutionally infirm *as applied to Sisson*. Since the evidence of conscientious objection was undisputed at trial<sup>3</sup> and is undisputed now, the Solicitor General argues that the use of the facts here was akin to a stipulation of facts by parties in a criminal case, and that this Court has recognized that such a stipulation may be treated by the District Court as supplementing the indictment (like a bill of particulars). He relies on *United States v. Halseth*, 342 U. S. 277 (1952), and *United States v. Fruehauf*, 365 U. S. 146 (1961).<sup>4</sup>

<sup>2</sup> Brief, at 30.

<sup>3</sup> As the Court's opinion indicates, see *ante*, at 5-7, 17, the evidence of conscientious objection that was admitted at trial was subject to cross-examination and was discussed during the closing arguments, but solely in the context of Sisson's "wilfulness" in refusing induction, not respecting whether Sisson was or was not in fact a sincere conscientious objector.

<sup>4</sup> Both the *Halseth* and *Fruehauf* cases involved dismissals of indictments *before* trial. In *Halseth* the parties had entered into a stipulation for purposes of a motion to dismiss. The indictment charged in the words of the statute an unlawful use of the mails to deliver "a lottery or scheme." It was stipulated that the particular lottery involved would come into existence only if the addressee put the paraphernalia into operation. The District Court granted a motion to dismiss on the grounds that the statute

My disagreement with the Court is based upon much more fundamental grounds than those which the Solicitor General would use to avoid the strictures of the com-

did not apply to lotteries such as defendant's which were not yet in existence. This Court affirmed, necessarily relying on the particular facts about the particular mailing under attack. See 342 U. S., at 280-281. In *United States v. Fruehauf*, 365 U. S. 146 (1961), the indictment charged the appellant, again in the words of the statute, with unlawfully delivering money to a union representative. The District Court ruled that a trial memorandum filed by the Government constituted a judicial admission that a transaction at issue was a loan and concluded that the statute did not cover a loan. The Government appealed that construction of the statute. The Court refused to consider that the "admission" had clearly foreclosed the Government from proving at trial that the loan was a sham or otherwise constituted a transfer of something of value apart from an ordinary loan, thus violating the statute. Accordingly, it refused to pass on the merits of the appeal and remanded the case for a trial on the existing indictment.

*Halseth* and *Fruehauf* are inconclusive authorities on the issue of whether a stipulation can supplement an indictment and generate a basis for review under § 3731. While the majority recognizes that the issue has not been resolved, and although it purports not to resolve it here, it does rely on *United States v. Norris*, 281 U. S. 619 (1930), and a policy of construing the Criminal Appeals Act narrowly to express doubt that the Solicitor General's argument should be accepted.

*Norris*, however, is not a persuasive precedent. There the defendant was permitted to enter a plea of *nolo contendere* to the charge contained in the indictment. When he appeared for sentencing, a stipulation of facts was filed, and he then submitted a motion for arrest of judgment which relied on the stipulation. The District Court denied the motion but the Court of Appeals reversed, concluding that the indictment was insufficient in light of the stipulation. This Court in turn reversed the Court of Appeals, holding that after pleading guilty, a defendant may not then stipulate facts to test the constitutionality of his conviction. There was no suggestion that an appeal would not lie where a statute was held unconstitutional as applied to stipulated facts. Indeed, the Court's opinion seems at one point to suggest that if the defendant had withdrawn his plea, and then questioned the con-

mon-law concept of an arrest of judgment. In my view the Criminal Appeals Act contemplates that an arrest of judgment is appropriate in other than a closed category of cases defined by legal history. Specifically, there is no reason for the Court today to read into that class of cases all of the niceties of what might or might not have been included in the "judgment roll" at common law. We have outgrown those formalisms.

I have concluded that evidence adduced at trial can be considered by a district court as the basis for a motion in arrest of judgment when that evidence is used solely for the purpose of testing the constitutionality of the charging statute as applied. I do so because the legislative history surrounding the passage of the Criminal Appeals Act abundantly shows Congress contemplated review by this Court in such a case. The reasons for the Court's face-of-the-record limitation, in the technical common-law form of an arrest of judgment, have long since disappeared, and the Court's reliance on a policy disfavoring appeals under the Criminal Appeals Act is misplaced.

The Court's reasoning pays scant attention to the purpose of the Criminal Appeals Act and to the problem which Congress was attempting to solve in 1907 when the Act was passed. The legislative history of the Criminal Appeals Act reflects the strong desire by a number of Attorneys General of the United States for an appel-

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stitutionality of his conviction on stipulated facts, the question would have been open to consideration. 261 U. S., at 623.

Further, the majority's ultimate conclusions about the Act necessarily lead it into uncomfortable distinctions. For if the Government or the parties want a constitutional ruling about the applicability of a statute to a particular set of facts, it is only necessary to set out those facts as a part of the indictment or information.

late remedy in selected criminal cases.<sup>5</sup> Such a remedy had been provided in England and in some States, but the lack of such a remedy for the Federal Government had "left all federal criminal legislation at the mercy of single judges in the district and circuit courts. This defect became all the more serious because it became operative just at the beginning of the movement for increasing social control through criminal machinery."<sup>6</sup> Congress, however, was not stirred to complete its action on the proposals until a federal district court rendered its decision in *United States v. Armour & Co.*, 142 F. 808 (D. C. N. D. Ill. 1906), sustaining a motion to dismiss and ending a Sherman Act prosecution in which President Theodore Roosevelt had a great interest.

The House passed, without debate, a bill which gave the United States in all criminal prosecutions "the same right of review by writ of error that is given to the defendant," provided that the defendant not twice be put in jeopardy for the same offense. 40 Cong. Rec. 5408 (1906). The Senate, however, refused to accept the House bill. Rather, its Judiciary Committee offered as a substitute a more complicated bill which ultimately was refined to become the Criminal Appeals Act. In relevant part, the substitute would have allowed a writ of error by the United States "[f]rom the decision arresting a judgment of conviction for insufficiency of the indictment." S. Rep. No. 3922, 59th Cong., 1st Sess. (1906). When the substitute came to the floor of the Senate, the floor leader for the bill, Senator Knute Nelson of Minnesota, explained the need for the legisla-

<sup>5</sup> See Kurland, *The Mersky Case and the Criminal Appeals Act: A Suggestion For Amendment of the Statute*, 28 U. Chi. L. Rev. 419, 446-449 (1961).

<sup>6</sup> F. Frankfurter and J. Landis, *The Business of the Supreme Court* 114 (1928).



tion in constitutional terms: "[S]ometimes an indictment is set aside on the ground that the law under which the indictment was found is held to be unconstitutional. *The object [of this Bill] is to allow the Government to take the case up and get a ruling of the Supreme Court.*"

40 Cong. Rec. 8695 (1906) (emphasis added). The Bill was then put over in the absence of unanimous consent for consideration. When the Bill returned to the floor, questions were raised with respect to the arrest of judgment provision regarding the prohibition against double jeopardy. Unanimous consent to proceed again was withdrawn and the Bill was again put over. 40 Cong. Rec. 9033 (1906).

An amended Bill was reported out of committee in January of 1907. When this Bill reached the floor, a spirited three-day debate took place respecting its impact on an accused. Indeed, among the questions discussed was whether a defendant who succeeded on a motion in arrest of judgment could again be prosecuted. See 41 Cong. Rec. 2192-2193 (1907). But almost none of the debate concerned the scope of an "arrest of judgment." Senator Knox, who had been the Attorney General before going to the Senate, did say that "this legislation is along the line of the law as it is understood in England under the common law." 41 Cong. Rec. 2751 (1907). However, this statement apparently referred to the right of the Government to appeal, for it was immediately followed by the observation: "In England the Crown always had the right to an appeal in a criminal case. In my own State since its foundation the right has been conceded." *Ibid.* The manifest, overriding concern of the Senate was with enacting legislation which would permit appeals as to important *legal* questions always subject to the bar against double jeopardy.<sup>7</sup>

<sup>7</sup> "The Government takes the risks of all the mistakes of its prosecuting officers and of the trial judge in the trial, and it is

and this concern carried over to the arrest of judgment provision.<sup>\*</sup> Indeed, the major limiting amendment adopted by the Senate restricted the right of review by the Government in criminal cases to constitutional issues and questions of construction of the statute under which the charge was brought. See 41 Cong. Rec. 2819-2820 (1907).

Another illustration of what the Senate thought it was doing in describing this category of appeals comes from the emphasis on distinguishing a "motion in arrest" from an "acquittal." See 41 Cong. Rec. 2748 (1907). From the latter, to be sure, there was to be no appeal, no matter how many errors the trial judge had committed along the way to the acquittal in the form of erroneous rulings or other trial errors. As the majority has noted, an amendment was adopted which required that *verdicts* in favor of the defendant could not be set aside on appeal. 41 Cong. Rec. 2819 (1907). The text of the amendment as adopted read: "*Provided, That if upon appeal or writ of error it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside.*" *Ibid.* The proponent of the amendment, Senator Rayner, expressed the view that the amendment was directed toward a "*verdict of not guilty*, whether by the court or the jury . . . ." 41 Cong. Rec. 2747 (1907) (emphasis

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only proposed to give it an appeal upon questions of law raised by the defendant to defeat the trial and if it defeats the trial." 41 Cong. Rec. 2752 (1907) (remarks of Senator Knox)."

<sup>\*</sup>"[A motion in arrest of judgment] is a case in which the defendant has been tried, in which he has been found guilty on the merits of the case, and by reason of some technicality, if I may use the term in its broad sense, the hand of the court is arrested from imposing the penalty upon him." 41 Cong. Rec. 2753 (1907) (remarks of Senator Patterson).

added). Here, of course, Sisson was not acquitted but was found guilty by the jury. Further, the Court's use of the Rayner amendment to support a narrow reading of the "arrest of judgment" provision is incongruous in the extreme in light of the fact that the amendment had no substantive effect and was later deleted from the Act. See MR. JUSTICE WHITE's opinion, *post*, at 20, n. 11.

"Trial errors" respecting the fact-finding function—which affect only the particular trial—were distinguished from errors of law which had been separated from the trial on the merits, and which involved constitutional rulings which could affect future attempts of the Government to prosecute under the same statute:

"The defendant gets the benefit of all errors in the trial which are in his favor, and can challenge all errors in the trial which are against him. It is certainly not too much when he attacks the trial itself or the law under which it is conducted to give the people the right to a decision of their highest courts upon the validity of statutes made for their protection against crime." 41 Cong. Rec. 2752 (1907) (remarks of Senator Knox).

"The motion in arrest of judgment can only be made—it is wholly inapplicable to any other condition than that of conviction—to a verdict of guilty. It is interposed after a verdict of guilty and before judgment for an alleged legal reason that will arrest the court in pronouncing judgment upon the verdict." 41 Cong. Rec. 2753 (1907) (remarks of Senator Patterson).

The Senate passed the bill with the acquired floor amendments on February 13, 1907. 41 Cong. Rec. 2825 (1907). The House insisted on a conference, but the conference committee adopted the Senate version. The

resulting conference committee bill was ultimately adopted. 41 Cong. Rec. 3994, 4128 (1907).

Notably, the debates on the Senate bill which formed the basis of the Act demonstrate a total lack of concern with the technical niceties of ancient common law forms of pleading. And, far from distinguishing cases where a congressional act was invalidated on its face from cases where it was invalidated as applied to a situation which Congress clearly intended to reach, the debates appear to contemplate both cases as appropriate for appeal to this Court—certainly the evil aimed at, and the rationale of the Act is broad enough to encompass both situations. Appeal was to be for the purpose of deciding “constitutional questions,” “questions of law” which, if the district judge’s decision were permitted to stand could lead to conflict and different treatment under the same criminal statutes in different parts of the country, with no opportunity under existing law for resolution in this Court. The Government was to have a chance to “settle the law as to future cases of like character.” 41 Cong. Rec. 2194 (1907) (emphasis added).

It is difficult to imagine a case more closely fitting into this rationale than that now before us. The class of nonreligious conscientious objectors is not likely to be a small one. Indeed under the impetus of this holding it is likely to grow. Yet whether or not a member of that class can constitutionally be punished for refusing to submit to induction now depends on where that person is tried and by whom. That one district judge may entertain a different view of the Constitution than does another is an extraordinary reason for differing results in cases which rationally ought to be decided the same way—and with appellate review available to insure that end. The conclusion that this is not a “motion in arrest,” insulates the judge’s constitutional decision from review anywhere—here or in the Court of Ap-

peals. That, I submit, is precisely the situation Congress thought it was correcting with the Criminal Appeals Act. It is remarkable that the Court finds it so easy to ignore the explicit and meaningful legislative history which refutes its strained reading of the statute and history.

The common-law rule that an arrest of judgment could be based on nothing more than the judgment roll seems to have been required by the existence of the very limited record of that day which did not include the evidence adduced at trial. Evidentiary matters were not before the appellate courts, and it would have been impossible for the arresting court's "successors . . . [to] know the grounds of their judgment," *Sutton v. Bishop, supra*, if the arresting court considered the evidence at trial. This Court in this case obviously has no such problem in providing appellate review. The records before us contain complete transcripts of the trial proceedings as a matter of course.

Accordingly, while the District Court admittedly looked to evidence, including demeanor evidence, for its findings that Sisson was "sincere" and was "genuinely and profoundly governed by conscience," this use for that purpose should not now bar this Court from considering the District Court's action as an arrest of judgment. As long as the evidence was used to test the constitutionality of the charging statute as applied to the defendant, and not to test the sufficiency of the proofs against the allegations in the indictment, the use of the evidence was consistent with the purposes of an arrest of judgment.

In this case, there has been no finding that Sisson did not commit the acts charged; there has been only a holding by the trial judge that his acts were constitutionally protected—a holding which stands as the sole impediment to imposing a jury verdict of guilty; no



verdict of acquittal was ever returned. Even our present Federal Rules of Criminal Procedure make a similar distinction between a "Motion for Judgment of Acquittal," Rule 29, and an "Arrest of Judgment," Rule 34. The former is entered "if the evidence is insufficient to sustain a conviction" of the offense charged, while the latter is granted where the indictment "does not charge an offense" at all. Rule 29 allows a judge to reserve his decision on a motion for judgment of acquittal until after the jury has returned a verdict. If he then grants the motion, the defendant stands acquitted, but again only because *the evidence* has been found insufficient to support the charge. Where the grounds for granting an "acquittal" are based on an independent legal decision about the interpretation or construction of the statute, the judge's action will be an "arrest of judgment" even though he labels it an "acquittal." *United States v. Waters*, 175 F. 2d 340 (C. A. D. C. Cir. 1948).

I cannot believe that Congress, fully aware that no appeal was available for a directed verdict or judgment n. o. v. after verdict, contemplated that this form of judicial action should be accorded the same nonappealable status. Moreover, the sophisticated District Judge could have entered a judgment n. o. v. if he wanted to avoid review or if he thought that he was indeed passing on the sufficiency of the evidence to meet the allegations of the indictment. Of course, his views are not controlling, but I am comforted by his appraisal and quite satisfied he knew precisely what he was doing—or thought he did on the assumption that his action was reviewable under well-established principles the Court now ignores.

The Court also inveighs against a "broad" construction of the Act, noting that this Court has denominated an appeal by the Government in a criminal case as an "exceptional right," and as "something unusual, exceptional, unfavored." *Ante*, at 22. This is an odd char-

acterization; the right is precisely as "exceptional" or "unusual" as Congress makes it. This Court has no power to define the scope of its own appellate review in this context and a subjective distaste for review at the instance of government has no proper place in adjudication. The tendency to be miserly with our jurisdiction did not prevent our construing the three-judge court acts to include cases where statutes were held unconstitutional as applied, *Query v. United States*, 316 U. S. 486 (1942); C. Wright, *Federal Courts* 190 (1970), and it should not carry any more weight in assessing our responsibility to decide the constitutional issues in this case,<sup>9</sup> the more so when it is a constitutional holding of great moment.

## II

The second requirement, that the decision of the District Court must rest upon the "insufficiency of the indictment," also presents a difficult question here. The Court emphasizes, wrongly, in my view, that both

<sup>9</sup> The one case in this Court which has even tangentially considered whether evidence adduced at trial can ever be considered as the basis of a motion in arrest of judgment was *United States v. Green*, 350 U. S. 415 (1956). There the majority of the Court was impelled to explain the basis for its decision by explicitly pointing out that "the record does not contain the evidence upon which the [district] court acted. . . . We rule only on the allegations of the indictment . . . ." 350 U. S., at 421. Mr. Justice Douglas, with whom Chief Justice Warren and Mr. Justice Black joined, dissented on the ground that the District Court's "order granting the motions in arrest of judgment rested at least in part upon the insufficiency of the evidence to support the conviction." *Ibid.* But neither the position adopted by the majority nor that taken by the dissenters in *Green* is remotely dispositive of the present case. Here, in contradistinction to the dissenters' view of the circumstances in *Green*, evidence adduced at trial was used by the District Court solely for the purpose of testing the constitutionality of a statute as applied; the District Court's opinion concedes the sufficiency of the evidence to sustain the verdict if the constitutional views expressed in the opinion are not sustained.

grounds upon which the District Court's decision rests are defenses which Sisson successfully asserted. In an ordinary case, an indictment, to be sufficient, need not anticipate affirmative defenses. This, however, is not the ordinary case. The indictments in cases of this nature typically charge only that the Selective Service registrant

"did unlawfully, knowingly and wilfully fail and neglect and refuse to perform a duty required of him under and in the execution of the Military Selective Service Act of 1967 and the rules, regulations and directions duly made pursuant thereto, particularly 32 Code of Federal Regulations 1632.14, in that he did fail and neglect and refuse to comply with an order of his local draft board to submit to induction into the armed forces of the United States; in violation of Title 50, Appendix, United States Code, Section 462." <sup>10</sup>

Yet this allegation subsumes in its terse language a myriad of elements which the Government may be called upon to prove if the defense makes an appropriate challenge. Prosecutions for refusing to submit to induction are unusual because they incorporate into the judicial proceeding much that has occurred in the administrative processes of the Selective Service System. All of the courts of appeals have compensated for the administrative proceedings by holding that the Government need not plead and prove many elements which would normally be a part of its case-in-chief. The courts of appeals have devised a presumption of regularity which attaches to the official acts of the local boards that, standing alone, is sufficient to preclude reversal of a conviction when a given element is not raised at trial. See particularly *Yates v. United States*, 404 F. 2d 462

<sup>10</sup> Appendix, at 6.

(C. A. 1st Cir. 1968) (presumption of regularity attaches to the order of call requirement). However, if the defendant succeeds in making a *prima facie* case against the presumption, the Government is put to its proofs on the particular element of the offense. See *United States v. Baker*, 416 F. 2d 202 (C. A. 9th Cir. 1969).

By analogy, the Government is not required to plead and prove that the defendant was properly classified in category I-A as available for induction. Rather, the defendant can challenge the classification at trial if he has preserved his claim, and force the Government to prove that there was indeed a "basis in fact" for the classification. Thus, establishing the appropriate classification is actually an element of the Government's case, but because of the deference given to the administrative process which preceded the criminal proceedings, the Government has been excused from pleading and proving it in the indictment. Since the general allegations in the indictment actually do subsume the element which the District Court held was based on an invalid statute as applied to Sisson, that court's decision was based on the "insufficiency of the indictment" within the meaning of § 3731.

The Court also appears to assume that an indictment may be "insufficient" because the acts charged cannot constitutionally be made an offense, *e. g.*, where they show the existence of a constitutional privilege which bars conviction. But, the Court concludes that "this indictment . . . does not allege facts which themselves demonstrate the availability of a constitutional privilege." *Ante*, at 19.

In my view, the Court's suggestion is simply the same argument, differently approached, as the argument that a motion in arrest can be based only on facts appearing on the face of the record. In both cases, the single question as I see it is whether Congress drew a

distinction for purposes of appeal by the Government, between cases in which the district court found the entire statute unconstitutional, and cases in which the court found the statute unconstitutional as applied.

The view has been expressed that the Criminal Appeals Act is badly drawn and gives rise to a multitude of problems. We can all agree as to the infirmities of the statute but this is hardly an excuse to take liberties with its plain purposes reasonably articulated in its terms. Prior urgings addressed to the Congress to correct this situation have gone unheeded. But the Court's holding today is a powerful argument to spur corrective action by Congress.





# SUPREME COURT OF THE UNITED STATES

No. 305.—OCTOBER TERM, 1969

United States, Appellant, } On Appeal From the United  
v. } States District Court for the  
John Heffron Sisson, Jr. } District of Massachusetts.

[June 29, 1970]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

## I

I agree with THE CHIEF JUSTICE that this case can be appealed by the Government under the "motion in arrest" provisions of the Criminal Appeals Act. In contrast to the rather clear remedial purpose of the Act, not a single passage in the legislative history indicates congressional awareness that the words it was using had the effect of distinguishing cases where a congressional act was held invalid on its face, from cases where it was invalidated as applied to a sub-class within the Act's intended reach. In both cases, the indictment is "insufficient" to state a valid offense.<sup>1</sup> In both cases, any "factual findings" necessary to give the particular defendant the benefit of the constitutional ruling are little more than findings as to the defendant's standing to raise the constitutional issue—they are not findings as to the sufficiency of the evidence to prove the offense alleged in the indictment.<sup>2</sup> Thus, if Judge Wyzanski, without

<sup>1</sup> Failure to set out the elements of a *valid* offense against the named defendant is the only way an indictment could ever be "insufficient" because of the unconstitutionality (as opposed to the construction) of the underlying statute.

<sup>2</sup> The majority, as THE CHIEF JUSTICE's opinion makes clear and as I discuss in more detail later, *infra*, at 8-10 n. 6, 16-17, repeatedly ignores this difference between the facts necessary to secure relief for Sisson on his constitutional claim, and the facts relevant to the offense of wilfully refusing induction.

making any findings as to Sisson's sincerity, had held the Act unconstitutionally overbroad because it purported to subject to the draft in violation of the Free Exercise Clause sincere, nonreligious objectors, this Court would clearly have jurisdiction and would face the question whether Sisson could raise the claim without showing that he was a member of the allegedly protected class. Cf. *Thornhill v. Alabama*, 310 U. S. 88 (1940). If such a showing had to be made, as the judge here held it did, the question of standing and the facts relevant to that question are surely distinct from the question of whether the defendant committed the offense, or the question of the validity *vel non* of the statute.<sup>3</sup> Cf. *Association of Data Processing Service Organizations v. Camp*, 397 U. S. 150 (1970); *Barlow v. Collins*, 397 U. S. 159 (1970).

## II

We asked the parties in this case to consider whether 18 U. S. C. § 3731 confers jurisdiction on the ground that the lower court had sustained "a motion in bar, when the defendant has not been put in jeopardy." The majority, after a lengthy discussion of the "motion in arrest" provision, condescends to address a few remarks to this question, with the suggestion that it really needn't discuss the issue at all, since it has concluded that Judge Wyzanski's action amounted to "an acquittal." As Mr.

<sup>3</sup> The majority seems to recognize that it would have difficulty justifying a refusal to hear an appeal challenging Judge Wyzanski's ruling on the Establishment Clause, simply because findings had to be made as to the defendant's standing to raise the issue. See *ante*, n. 16. But there is no real difference in this respect between Judge Wyzanski's free exercise and establishment rulings: both—as the majority concedes, *ante*, n. 16—require factual determinations that Sisson belongs to the class which is entitled to raise the constitutional claim that is being asserted. If the ruling on the first is "an acquittal," so is the ruling on the second, since the judge *might* have sent the establishment issue to the jury too. See *infra*, at 3-4.

JUSTICE BLACK's concurrence indicates, the lengthy discussion of the "motion in arrest" provision is equally superfluous if indeed it is so clear that Sisson has been "acquitted." In reality, the bald assertion that Sisson has been "acquitted" simply begs the matter at issue: until one knows what a "motion in bar" is, as well as a "motion in arrest," and how the granting of such motions differs from granting a judgment of acquittal, one cannot confidently attach any label to Judge Wyzanski's action.

The only reason the majority gives for concluding that Sisson has been acquitted is based, not on what actually happened, but on what *might have* happened. Since Judge Wyzanski *could have* submitted the case to the jury on instructions reflecting his view of the law, and since the jury so instructed *could have* returned a verdict of "not guilty," therefore we must pretend that that is what has actually happened. That suggestion is nonsense. One does not determine "what in legal effect [Judge Wyzanski's decision] actually was," majority opinion, *ante*, n. 7, by asking "what in legal effect the decision might have been." If that were the key question, then this Court should not have had jurisdiction in *United States v. Covington*, 395 U. S. 57 (1969) (HARLAN, J.). There the trial judge accepted the defendant's argument that the Fifth Amendment prevented the Marihuana Tax Act from constitutionally being applied to him. Under the majority's view, that action would amount to an acquittal because the judge *might have* given the case to the jury under instructions that they should acquit if they found the facts necessary to sustain the defendant's privilege—*e. g.*, that he was not one of the registered marihuana dealers whose conduct was legal under state law. Indeed, if applied consistently the majority's theory would mean that there is no case which could be appealed to this Court under the

"motion in bar" provision of the Criminal Appeals Act. For it will always be true that a judge *might have* sent the case to the jury under instructions reflecting his view that the motion in bar was good, so that if the jury found the facts relied on in the motion, they should acquit.<sup>4</sup>

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<sup>4</sup> Consistently applied, the majority's theory would make no case appealable to this Court. For even where a judge dismisses an indictment or grants a motion in arrest because of defects "on the face of the record," it is always true that he *might have* sent the case to the jury, instructing them to acquit if they found the facts alleged in the indictment, thus insulating the case from review because of the intervening jury acquittal.

The majority's protest that its conclusion does not rest on "what might have happened," *ante*, at 21 n. 19, simply serves to highlight the *ipse dixit* nature of its opinion. For the plain fact is that no other reason is ever given to explain why Judge Wyzanski's action amounted to a post-verdict directed acquittal. The question in this case is whether an affirmative defense, relying on facts developed at trial and sustained by the trial judge after a jury verdict of guilty, can amount to an appealable "motion in bar." It is no answer to this question simply to repeat that this is a case in which Judge Wyzanski after a verdict of guilty sustained Sisson's defense on facts developed at the trial—a clearer case of question-begging can hardly be imagined. Such a simple restatement only poses the question which is to be decided: does such action amount to a nonappealable "acquittal" and, if so, why?

One answer to this question is suggested by the majority in its citation to *United States v. Ball*, *ante*, at 20-21. An acquittal is the type of judgment which cannot be reviewed without putting the defendant twice in jeopardy for the same offense in violation of the Constitution. Indeed, the legislative history shows that Congress was well aware of the *Ball* decision, and strongly suggests that Congress thought that nonappealable "acquittals" were only those in which review was incompatible with the double jeopardy provisions of the Fifth Amendment. See, *e. g.*, 41 Cong. Rec. 2193. But despite the citation, I cannot believe that the majority really means to suggest that Congress could not constitutionally authorize an appeal in a case precisely parallel to this one in accordance with currently sought legislation. That would indeed be throwing the



The difference between "what might have been" and what actually happened in this case is large and critical. Where the jury actually "acquits" under an erroneous instruction, a successful appeal leading to reversal and a new trial, would raise serious constitutional problems by placing the defendant through the hazards of another trial for the same offense. In this case, however, there is no possibility of subjecting Sisson to another trial, or of overturning a factfinder's decision that, whatever the law, Sisson should go free. If Judge Wyzanski's legal theory is incorrect, the jury's verdict of guilty—with judgment no longer "arrested"—simply remains in effect.

It was precisely this distinction which Senator Knox was referring to in the passage quoted in the majority opinion, *ante*, at 20: the defendant retains the benefit of any error whatever committed by the court "*in the trial*"; but the Government gets an appeal "upon ques-

baby out with the bathwater in order to declare this case an "acquittal" and thus avoid being forced to reach the merits now.

What other reason is there for deciding that this is a case of "acquittal"? One obvious suggestion is that the question of whether a judge's action amounts to an "acquittal" admits of no single answer, but depends on the reasons for making the inquiry in the first place. Here the inquiry is whether Congress meant to allow an appeal where a statute had been held invalid as applied to a class within its reach and where the defendant's constitutional jeopardy interests are in no way threatened by the appeal. The majority's absolute refusal to discuss or respond to the legislative history on this question, set out below, see *infra* —, indicates that this approach would also lead to the conclusion that Judge Wyzanski granted an appealable "motion in bar" rather than an "acquittal."

The only other noncircular answer which I can find in the majority's opinion is that this is an acquittal because the judge "might have" sent the case to the jury under his novel instructions, resulting in a verdict of not guilty, from which an appeal would indeed jeopardize the defendant's constitutional interests. That answer, as the majority's discomfiture indicates, is not a very good one.

tions of law raised by the defendant to defeat the trial." The distinction is also reflected in the majority's quotation from *United States v. Ball*, *ante*, at 20, where the question of what constitutes an "acquittal" is tied to the question of whether the defendant would be put "twice in jeopardy" by an appeal.

I suspect that the Court's reluctance to discuss the "motion in bar" provision and to distinguish the granting of such motions from an acquittal stems from the fact that, unlike the "motion in arrest," there is no doubt that a "motion in bar" properly sets forth an affirmative defense, which necessarily requires resort to facts not found in the indictment or on the face of the "record." Thus most of the majority's argument that this case is not appealable as a "motion in arrest" because "[t]he decision below rests on affirmative defenses," *ante*, at 18-19, is simply irrelevant as far as the "motion in bar" is concerned.

In fact, as the majority seems to concede by its reluctance to reject square precedent on the issue, see *ante*, at 30 n. 53, our cases make clear that the phrase "motion in bar" would include a plea like *Sisson's* that the selective service laws are unconstitutional as applied to him. The Court has never adopted the view that a "motion in bar" encompasses only the common-law defenses of *autrefois* acquit, *autrefois* convict, and pardon.<sup>5</sup> Neither did Congress when it passed the Act. The debates show that the plea in bar was thought to embrace such a variety of defenses as the statute of limitations, *e. g.*, 41 Cong. Rec. 2749 (1907), and a plea of Fifth

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<sup>5</sup> One will search the majority's opinion in vain for an explanation as to why "motion in arrest" must be pinned to its common-law meaning, while "motion in bar,"—which the majority also concedes had a unique meaning at common law, see *ante*, at 30 n. 53—has never been so confined. See *United States v. Covington*, 395 U. S. 57 (1969) (HARLAN, J.); *United States v. Blue*, 384 U. S. 251 (1966) (HARLAN, J.).

Amendment immunity, see 41 Cong. Rec. 2753 (1907). The most thorough discussion of the "motion in bar" in this Court occurs in the concurring and dissenting opinions in *United States v. Mersky*, 361 U. S. 431 (1960). MR. JUSTICE BRENNAN argued that a motion in bar would encompass every possible affirmative defense which would prevent retrial. MR. JUSTICE STEWART argued for a narrower interpretation, similar to the concept of a plea in confession and avoidance, i. e., a plea that "did not contest the facts alleged in the declaration, but relied on new matter which would deprive those facts of their ordinary legal effect." *United States v. Mersky*, *supra*, at 457.

Even under the narrower interpretation of MR. JUSTICE STEWART, Sisson's plea qualifies as a "motion in bar." For as the majority's opinion makes clear, the crux of the case against Sisson was simply whether or not he had wilfully refused to submit to induction; the question of his sincerity was "new matter" relied on to deprive the fact of his wilfull refusal of its ordinary legal effect. See majority opinion, *ante*, at 7; *United States v. Blue*, 384 U. S. 251, 254 (1966) (HARLAN, J.). Just as our cases have permitted the "motion in bar" to embrace limitations pleas, see, e. g., *Goldman v. United States*, 277 U. S. 229 (1928), and pleas of constitutional privilege, see *United States v. Murdock*, 284 U. S. 141 (1931), so too they permit the "motion in bar" to reach cases of this sort, attacking the validity of the statute as applied to the defendant. See *United States v. Covington*, 395 U. S. 57 (1969) (HARLAN, J.); *United States v. Blue*, *supra*, at 254 (HARLAN, J.).

Procedurally, the fact that the plea is sustained only after a jury verdict of conviction—and the fact that the judge labeled his action as something other than a "motion in bar"—does not prevent finding a "motion in bar." *United States v. Zisblatt*, 172 F. 2d 740, 742 (C. A. 2d Cir.), appeal dismissed, 336 U. S. 934 (1949). Even

the legislative history recognizes that such pleas could be sustained after the trial had begun. 41 Cong. Rec. 2749 (1907) (remarks of Senator Rayner). Nor is there any doubt—unlike the case of a motion in arrest—that a proper motion in bar results even though factual issues relevant to the motion have to be tried. See 41 Cong. Rec. 2194 (1907) (remarks of Senator Whyte); *id.*, at 2753 (remarks of Senator Patterson); *United States v. Zisblatt*, *supra*. Indeed, MR. JUSTICE HARLAN recently referred to the possibility of trying facts to the judge which were relevant to the motion in bar, and separate from the general issue. See *United States v. Covington*, *supra*, at 60. In his words, “[a] defense is thus ‘capable of determination’ [without trial of the general issue] if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.” *Ibid.* That description fits this case precisely since, as already noted, the majority itself takes careful pains to point out that the “general issue”—whether Sisson wilfully refused induction—was at all times separate from the issue raised by Sisson’s constitutional claim.<sup>6</sup>

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<sup>6</sup> The majority concedes that the judge’s instructions to the jury excluded the question of Sisson’s sincerity from the question of Sisson’s guilt under the Act. See *ante*, at 7. Indeed, Sisson’s sincerity could not possibly bear on whether Sisson had wilfully refused induction: since Sisson did not seek a I-O classification, he could not even argue his “sincerity” to show “no basis in fact” for his I-A classification. Moreover, as the majority again points out, *ante* n. 2, even Sisson recognized that his “selective” objection to war foreclosed him from obtaining C. O. status under the Act. Sisson’s sincerity was thus relevant only to his constitutional defense and was as distinct from the issue on the merits as would have been a claim that the prosecution was time barred. In that sense, the factual questions relevant to Sisson’s motion were not part of “the general issue.” I do not read THE CHIEF JUSTICE’S opinion, which discusses Sisson’s defense in a wholly different context, as suggesting anything different. The majority’s suggestion, *ante*, at 30,

This case, then, is indistinguishable as far as the "motion in bar" provision is concerned from *United States v. Zisblatt, supra*, which the majority cites with approval throughout its opinion. There, as here, the de-

that a defense of privilege in a speech case may involve facts inextricably intertwined with the general issue, and the majority's reference to *United States v. Fargas, ante*, at 32, are perfect examples of repeated refusal to come to grips with the facts of this particular case where the issues were not and could not have been intertwined. Whether Sisson might have demanded a jury trial on the facts relevant to his motion is also a question not presented here, any more than it was in *United States v. Covington*, 395 U. S. 57 (1969) (HARLAN, J.).

The legislative history makes clear that trying facts which go to the plea, as opposed to facts which go to the "general issue" in the sense just described (whether the defendant committed the act) results in an appealable motion in bar as long as the defendant has not been "put in jeopardy." Compare 41 Cong. Rec. 2750 (remarks of Senator Nelson), with *id.*, at 2753 (remarks of Senator Patterson). See text, *infra*, at 16-17. The reason for the distinction appears to be the wholly sensible one of not permitting appeals which might involve overturning the findings of the trier of fact—whether it be judge or jury. Nobody suggests in this case that Judge Wyzanski's findings as to Sisson's sincerity are reviewable; the only question is whether those findings are legally relevant. While I can sympathize with the majority's concern to distinguish *Covington*, I do not see the relevance of the purported distinction, see *ante*, at n. 56. There, as here, the trial judge explicitly refused to declare the relevant Act unconstitutional on its face and necessarily rested his action on factual findings concerning the particular defendant, see 282 F. Supp. 886, 889-890. In fact, under the majority's reasoning, it would have been even easier to argue in *Covington* that the facts needed to prove the constitutional defense were part of the "general issue," since proof at a trial on the merits would necessarily have involved developing such things as defendant's status as a marihuana dealer. The majority suggests that there the Government conceded the relevant facts, whereas here they were contested. While that suggestion is itself highly dubious, see THE CHIEF JUSTICE's opinion, *ante*, at 4, until the majority explains how that distinction is at all rele-



fendant moved for dismissal of the indictment on the basis of an affirmative defense—in that case the statute of limitations. There, as here, the judge reserved ruling on the motion until after the jury had returned a verdict of guilty. There, as here, the judge then granted the defendant's motion, relying on matters "outside the record." The Government appealed to the Court of Appeals, where the question became whether or not the appeal should have been taken directly to this Court under the Criminal Appeals Act. Judge Learned Hand, in deciding that the trial court's action amounted to sustaining a motion in bar, made short shrift of the argument that the case was indistinguishable from the case of a directed verdict of acquittal.

"Had the trial judge directed a verdict, so that it would have been necessary upon reversal to subject the defendant to trial before a second jury, that would be 'double jeopardy,' but, although the Constitution gives an accused person the benefit of any mistakes in his favor of the first jury he encounters, whether it has passed upon his guilt or not, it does not extend that privilege to mistakes in his favor by judges. Indeed were the opposite true, all appeals from decisions in arrest of judgment would be constitutionally futile because no judgment of conviction could be entered when they were reversed." 172 U. S., at 743.

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vant, reiterating the distinction again only begs the issue posed by this case. See n. 5, *supra*. For whether the issue was conceded or contested it remains true under the majority's analysis that *Covington* cannot be distinguished from a directed acquittal "entered on the ground that the Government did not present evidence sufficient to prove that [Covington] was [not faced with a substantial possibility of incrimination]." Majority opinion, *ante*, at 29-30.

The sole question, then, in this case as in *Zisblatt*, is whether the defendant has been "put in jeopardy" as that phrase is used in the Criminal Appeals Act. That question in turn centers on whether the phrase is to be read literally, in which case a defendant would be in jeopardy as soon as a jury was impaneled, or whether the phrase is to mean "constitutional" or "legal" jeopardy, in the sense that even if the Government were to succeed on appeal, it would be unable to take advantage of its success in new proceedings against the defendant. Although the Government has chosen to read the statute in the former, literal sense, this Court has never resolved the issue. Judge Learned Hand thought there was a "more than plausible argument" for the latter, "legal jeopardy" view, but the Government dismissed its appeal to this Court before the question could be decided. *United States v. Zisblatt, supra*, at 742.

The legislative history of the 1907 Act unmistakably shows that Congress meant to allow the Government an appeal from a decision sustaining a motion in bar in every case except where the defendant was entitled to the protection of the constitutional guarantee against double jeopardy. I find the debates so convincing on that point that I am at a loss to understand why the Government has so readily conceded the issue unless it be to maintain the appearance of consistency, and to protect its interests in securing new criminal appeals legislation before Congress.<sup>7</sup> Certainly that concession

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<sup>7</sup> See majority opinion, *ante*, at n. 61. Of course, the legislation which the Government sought shortly after the Act was passed—requiring a defendant to raise his defenses before trial—does not necessarily mean that the then-Attorney General interpreted "jeopardy" to mean literal jeopardy. The legislation would have been equally needed to prevent defendants from waiting until "constitutional jeopardy" had attached, before securing relief on a motion

does not bind this Court;<sup>8</sup> even more certainly it is no excuse for the majority's failure to conduct its own examination of the relevant debates.

Out of three full days of debate in the Senate, covering more than 30 pages of the Congressional Record, see 41 Cong. Rec. 2190-2197, 2744-2763, 2818-2825 (1907), the majority finds a total of three passages to cite in footnote as support for its interpretation, see *ante*, at 34 n. 57. In each case, the statements placed in context prove just the opposite of the majority's conclusion. The first reference, to a passage before debate even began, 40 Cong. Rec. 9033 (1906), is to Senator Spooner's question whether the bill applied only to questions arising

in bar. Indeed, it is because it was thought that "constitutional jeopardy" had attached in the *Beef-Trust* case that no appeal was thought to lie. See *infra*, at 17-18. Since the *Beef-Trust* case was the motivating force behind the Criminal Appeals Act, it would be natural for the Attorney General to seek legislation which would force a similar defendant to raise and get a decision on his plea in bar before trial began, thus avoiding any possibility that the defendant would escape by being placed in legal jeopardy.

<sup>8</sup> To argue that the statute was enacted for the benefit of the Department of Justice hardly justifies relying on the Government's concession as additional authority for the proper interpretation of the Act. The relationship of the Department of Justice to the Criminal Appeals Act is not that of an agency to the statute creating the agency and charging it with enforcement of the Act's provisions. Indeed when it comes to the question of this Court's jurisdiction, no institution has special authority for exploring and determining that question other than this Court. The Solicitor General in this case is simply one of the litigants; to give special weight to his strategy in arguing this case at the very least does a disservice to Sisson, who—seemingly contrary to his own interests—has also made a concession: namely, that this Court does have jurisdiction under both the "motion in bar" and "motion in arrest" provisions. The views of the Justice Department on the "motion in bar" provision are entitled to precisely the same weight as the majority extends to Sisson's views and to the Justice Department's views on the "motion in arrest" provision.

ing before the impaneling of the jury. As the majority acknowledges, Senator Nelson immediately corrected Senator Spooner, pointing out that the key question was "jeopardy," not the impaneling of the jury. The entire brief exchange occurred before the bill was debated, further consideration having immediately been postponed by the objection of other Senators to pursuing the matter at that time. See F. Frankfurter and J. Landis, *The Business of the Supreme Court* 117 n. 68 (1927). When debate was resumed at the next session of Congress, Senator Spooner unmistakably indicated that jeopardy was being used in the constitutional, legal sense, in direct opposition to the views the majority now tries to ascribe to him:

"The question is whether it subjects a man under any aspect of it to the danger of double jeopardy. . . . I am content to leave it under the bill, it if shall become a law, to the Supreme Court of the United States. It is their function to determine what is jeopardy. It is their function to protect the citizens of the United States against any invasion of the constitutional guaranty as to double jeopardy. I think we can rely upon the court to protect as far as the Constitution requires it all defendants . . . ." 41 Cong. Rec. 2762-2763 (1907) (remarks of Sen. Spooner).

In the second passage, 41 Cong. Rec. 2191 (1907), the majority quotes Senator Nelson for the proposition that no appeal would lie where a jury had been impaneled. The actual quotation is that no appeal would lie "where a jury has been impaneled *and where the defendant has been tried . . .*" 41 Cong. Rec. 2191 (emphasis added). In context, it is clear that Senator Nelson is venturing an interpretation of "jeopardy" in the legal sense. The whole dispute at this point in the debate is

primarily between Senator Rayner who opposed the bill, and Senators Bacon and Nelson, who supported the bill. The proponents were at pains to show that a person could not be "put twice in jeopardy" under any of the provisions of the bill, 41 Cong. Rec. 2193 (1907) (remarks of Sen. McCumber; remarks of Sen. Bacon). Senator Rayner was intent on showing how difficult it was for anyone to give an adequate definition of just what "legal jeopardy" is—he supported a return to the House suggestion, which would have given the defendant the benefit of his favorable decision whether or not he had been "put in jeopardy." But not a single passage can be cited to show that either side had the slightest inkling that "jeopardy" was being used in any but its technical, legal sense as interpreted by this Court and state courts. That was the whole point of Senator Rayner's objection: "jeopardy" was too vague a term, because nobody could decide exactly when constitutional jeopardy had attached. How the majority can rely on Senator Nelson for the conclusion that "jeopardy" means "literal" jeopardy is particularly difficult to understand, given the Senator's own unambiguous explanation that as author of the bill, what he meant was "constitutional" jeopardy:

"I aimed to put the bill in such a form that it would cover exactly those cases in which the defendant had not been *put in jeopardy under the Constitution of the United States*. I believe that the bill is limited strictly to that matter." 41 Cong. Rec. 2757 (1907) (emphasis added).

Senator Bacon during this same exchange noted that the "jeopardy" provisions had been put in "out of an abundance of caution," 41 Cong. Rec. 2191; he proceeded to explain by his remarks that he meant precisely what the majority today declares he could not have meant—namely, that Congress was simply emphasizing that it was not attempting to subject a defendant to constitu-



tional double jeopardy by a successful government appeal. In fact, when one of the Senators asked whether "jeopardy" was to be taken in a possibly literal sense, Senator Bacon hastened to reply:

*"That is not what the law means by being put in jeopardy at all. The words 'being in jeopardy' are entirely a technical phrase, which does not relate to the fact that a man is in danger as soon as an indictment is preferred against him."* 41 Cong. Rec. 2191 (1907) (emphasis added).

It is hardly "superfluous" for Congress to guard against a construction of an Act which might render the Act unconstitutional. And the fact that the majority would have written the statute differently to avoid what it calls a "superfluous" reading, is no excuse for ignoring the explicit indication that that is exactly the reading which Congress meant the phrase to bear.<sup>9</sup>

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<sup>9</sup> This interpretation is reinforced at other points in the debate in a manner which also explains why the "jeopardy" language occurs in the motion in bar provision, and not in the other provisions. The Senators thought that indictments would normally be dismissed before trial began, so there would be no "jeopardy" problems in allowing appeals in such cases. Similarly, a motion in arrest after judgment was thought to involve no jeopardy problems, because the defendant made the motion himself in an attempt to overturn a verdict of guilty. See 41 Cong. Rec. 2753 (1907). But it was recognized that the motion in bar could be granted after trial had started, see 41 Cong. Rec. 2749 (1907); and it was not obvious whether in such a case "jeopardy" would have attached in the constitutional sense to prevent retrial. Hence, the "jeopardy" language was added "out of an abundance of caution" to make clear that Congress was simply bringing that provision into line with the other provisions: *i. e.*, appeals were to lie only where "constitutional jeopardy" had not attached; but jeopardy, not the impaneling of the jury, was to be the test of appealability in the case of the motion in bar just as in the case of the motion in arrest. See 41 Cong. Rec. 2191 (1907) (remarks of Senator Bacon); 41 Cong. Rec. 2756 (1907) (remarks of Senator Nelson) ("out of

The majority's final passage refers to a remark by Senator Patterson suggesting that a motion in arrest was the only provision under the bill which could be raised after a trial had begun. As the majority concedes, one needs only read on a bit further to discover that Senator Patterson immediately retracted that suggestion when challenged, insisting that a "motion in bar" could also be granted after trial had begun and that an appeal would lie as long as no problem of "constitutional jeopardy" was presented. Indeed, Senator Patterson argued vigorously that there would have been jurisdiction in the *Beef-Trust* case—a case in which the motion in bar was not only granted after trial had begun, but was also reflected in the judge's instructions to the jury. Senator Patterson's remarks are particularly interesting because, apart from whether he is right on the question of constitutional jeopardy, he makes clear the distinction between a motion in bar and an acquittal which the majority blithely ignores:

"A special plea in bar . . . is a plea that does not relate to the guilt or innocence of the defendant in the sense as to whether he did or not commit the act for which he was indicted. A special plea in bar is that which is set up as a special defense notwithstanding the defendant may be guilty of the offenses with which he is charged; it is for some outside matter; yet it may have been connected with the case. The packers is a very good illustration of that. Their plea in bar set forth the fact of their having been induced or led, whatever it may have been, to make reference to their business that

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extreme caution and to put it exactly in harmony and in line with the provisions of the three preceding paragraphs, we have expressly provided that where the defendant has been put in jeopardy he can not be reindicted").

gave the district attorney information which enabled him to bring about the indictments and to help in their prosecution. That had no reference to the guilt or innocence of the accused. It was a pleading of fact that was independent of the crime for which those packers had been indicted.

"Therefore, Mr. President, there could be no jeopardy in a case of that kind where there was a decision upon the special plea in bar, because it is not under a plea of guilty or not guilty that the insufficiency of a special plea in bar is determined; it is *non obstante* whether the defendant is guilty or not guilty." 41 Cong. Rec. 2753 (1907).

It is obvious from these remarks that Senator Patterson did not think that the question of "jeopardy" under the motion in bar provisions was simply a question of whether the jury had been impaneled.<sup>10</sup>

This interpretation is made doubly clear by the remarks of Senator Nelson, the leading proponent of the bill. He also addressed himself to the *Beef-Trust* case and, unlike Senator Patterson, he suggested that that case could not have been appealed under the Act. But the reason he gave for that conclusion was not that the jury had been impaneled, but that the jury had been impaneled and had returned a verdict of not guilty under the judge's instructions, thus placing the defendants in "legal jeopardy":

"In that case a jury was impaneled, and the question whether the defendants were entitled to im-

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<sup>10</sup> The majority's apparent willingness to accept Senator Patterson's suggestion that the *Beef-Trust* case could have been appealed, *ante*, at 35 n. 57, virtually concedes the issue. For the whole point is that in distinguishing between the plea and the issue on the merits, the Senator was plainly giving his views as to what constitutes "legal jeopardy."

munity under the immunity law because they had furnished Mr. Garfield and the officials of his Bureau information was submitted to the jury, and the jury under instructions of the court found for the defendants. In that case the defendants *under the Constitution had been in jeopardy* and in that beef-trust case no appeal could lie." 41 Cong. Rec. 2757 (1907) (emphasis added). See 41 Cong. Rec. 2750 (1907) (remarks of Senator Nelson).

Senator Nelson was thus talking about the majority's "might have been case"—the case where the judge gives the motion in bar issue to the jury under his novel view of the law, so that a successful government appeal would require retrying the defendant. In the immediately following passage, Senator Nelson makes clear that if the facts pleaded in the special issue are not submitted to the jury, but tried to the judge, there would be no bar to taking an appeal. But in both cases, Senator Nelson, like Senator Patterson, is quite obviously giving his views as to what "constitutional jeopardy" means.

While the debates are replete with other indications that Congress' concern was with "double jeopardy," not "literal jeopardy," the clearest such indication occurs in this very exchange between Senator Rayner, who announced his opposition to the bill in any form, 41 Cong. Rec. 2745 (1907), and Senators Spooner, Patterson, and Nelson—proponents of the bill. The exchange occupied most of the second day of the three days of debate in the Senate and centered almost entirely on Senator Rayner's proposed amendment. The example which Senator Rayner used to illustrate the difficulties he saw in the bill was a hypothetical case in which a plea in bar—a limitations plea—was sustained half-way through the trial. See 41 Cong. Rec. 2749 (1907). In that case, Senator Rayner argued, no one could say with certainty whether the de-

fendant had been put in jeopardy, and hence whether he could constitutionally be retried if the Government's appeal were successful. Senator Rayner did not want to leave the defendant's fate to depend on "this howling wilderness of confusion upon the subject of what constitutes *legal jeopardy*." 41 Cong. Rec. 2750 (1907) (emphasis added). His amendment would thus have guaranteed that a defendant could never be retried—whatever the ultimate resolution of the "legal jeopardy" question. Those who opposed the amendment argued that if it had any substantive effect, it would make the question on any appeal "moot"; that it was enough to make sure that the Government was not allowed to secure a reversal and proceed again where the result would place the defendant in "double jeopardy"; and that the bill would leave to the Supreme Court the question of what is "jeopardy," and hence protection "against any invasion of the constitutional guarantee as to double jeopardy." 41 Cong. Rec. 2761-2763 (1907); see also 41 Cong. Rec. 2173 (1907). But it is clear—indeed it was again crucial to Senator Rayner's argument—that the Senators assumed that "jeopardy" was being used in the legal sense:

"The question is whether it subjects a man under any aspect of it to the danger of double jeopardy." . . . "The Senator [Rayner] says he does not care whether it is double jeopardy or not. Even if a man under the Constitution may properly and lawfully be put on trial again, if he has been tried once, even though it were a mistrial, if he had been for a moment in jeopardy, he insists that we shall provide by law, no matter what the case may be, that he shall not be tried again; that he shall go acquit. . . . The matter has been thoroughly argued. I am content to leave it under the bill, if it shall become a law, to the Supreme Court of the



United States. It is their function to determine what is jeopardy. It is their function to protect the citizens of the United States against any invasion of the constitutional guarantee as to double jeopardy. I think we can rely upon the court to protect as far as the Constitution requires it all defendants without supplementing the Constitution by the Senator's amendment to this bill." 41 Cong. Rec. 2762-2763 (1907) (remarks of Senator Spooner).<sup>11</sup>

Senator Rayner's hypothetical example of a plea in bar sustained after trial had begun—an example accepted without question by Senators Patterson, Nelson, and

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<sup>11</sup> It should be noted that even Senator Rayner's Amendment did not purport to narrow the scope of cases in which the Government could appeal; it only sought to remove any "double jeopardy" problem by declaring that the defendant should retain a favorable decision, whatever the result on appeal.

On the third day of debate, the amendment was agreed to, modified to read:

"*Provided*, That if upon appeal or writ of error it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside." 41 Cong. Rec. 2819 (1907).

Senator Rayner's earlier opponents continued to insist that no material change had been made by the amendment, since as they had argued, there would be no appeal in any event where the defendant had received a "verdict" in his favor, see opinion of THE CHIEF JUSTICE, *ante*, p. —, as opposed to securing a favorable "judgment" by the trial court's action in sustaining his plea or arresting judgment. See 41 Cong. Rec. 2820 (1907). Without explanation, the Conference Committee changed the amendment to read:

"*Provided*, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

Subsequent amendments to the Act omitted the proviso altogether (which no longer appears in the current version) thus vindicating the arguments of Senator Rayner's opponents that the amendment had no substantive effect.

Spooner, and every other Senator participating in the debate—completely undercuts the majority's assertion that Congress thought there could be no appeal once the jury had been impaneled. Indeed, in the face of the arguments over the meaning of "jeopardy" and Senator Rayner's vigorous attack on the vagueness of that term, it is nothing short of incredible for the majority to suggest that Congress left that language in the Act, intending it to be interpreted as providing "a clear, easily administered test," *ante*, at 38. If Congress had intended the majority's interpretation it would have been both simple and logical to explicitly limit appeals to cases "where the jury has not yet been impaneled," thus avoiding the possibility of confusion which had been the very topic of discussion for three full days of debate.

The plain fact of the matter is that the majority's *post hoc* rationalization of the Act simply was not that of Congress. While the debates show considerable disagreement about the meaning of "jeopardy" in the legal sense, there is not the slightest suggestion anywhere in the legislative history that "jeopardy" is being used in any other sense. Even where references occur to the impaneling of the jury as the moment when jeopardy attaches, it is clear that jeopardy is still being used in its legal sense—after all, as the majority itself notes, *ante*, at 35, the impaneling of the jury does in fact often become the constitutionally relevant point in determining that "legal jeopardy" has attached to prevent a reprosecution. But the one point on which there was unanimous agreement—even from Senator Rayner, see, *e. g.*, 41 Cong. Rec. 2748 (1907)—about the meaning of "jeopardy," was that where a convicted defendant on his own motion had secured the arrest of a jury's verdict of guilty, he had not been placed in "jeopardy." "[T]he defendant could not complain, either if the judgment of the court shall be entered upon the verdict or a new trial

shall be ordered, because it is giving to the defendant a new opportunity to go acquit when, under the trial that was had, he had been convicted." 41 Cong. Rec. 2753 (1907).

For this Court to hold that Sisson has been placed in jeopardy under the motion in bar provisions, thus defeating jurisdiction, the Court must be prepared to hold that a successful appeal by the Government, resulting in an order that judgment be entered on the verdict, would violate Sisson's double jeopardy protection. Judge Learned Hand refused even to consider such a suggestion in *Zisblatt*: "So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition." 172 F. 2d, at 743.

### III

I find extremely peculiar the path which the Court follows in reaching its conclusion that we cannot hear this case. The "motion in arrest" provision is confined to its early common-law sense, although there is absolutely no indication that Congress was using the phrase in that sense, and we have never similarly limited the "motion in bar" provision to its common-law scope. The alleged trouble with the "motion in arrest" is not any problem of jeopardy, but the fact that Judge Wyzanski relied on facts outside the face of the "record." Conversely, the trouble with the "motion in bar" provision is not the use of outside facts, but solely the fear that Sisson was "put in jeopardy." If this were a motion in arrest, there would be no "jeopardy" problem; and if this were a motion in bar, resort to outside facts would pose no problem. The apparent inconsistency and the refusal to hear the case appears to be due to a dogged determination to fit Judge Wyzanski's action into one "common-law pigeonhole," *United States v. Mersky*, 361

U. S. 431, 442 (BRENNAN, J., concurring) or the other while paying scant attention to the reason for trying to make the fit in the first place, with the result that Judge Wyzanski's action is to be given the no less distorting label of "acquittal."

The question in this case should simply be whether or not a judge who upholds a claim of constitutional privilege, thereby declaring the statute unconstitutional as applied, has entered a judgment which Congress intended this Court to be able to review. Surely in a statute as unclear and ambiguous as the majority says this unhappy Act is, the "words" of the statute are only the first place to start the task of interpretation. The primary guide to interpretation should be the statute's purpose, as indicated by the evil which prompted it, and by the legislative history.

The Act was passed to remedy the situation which gave a single district judge the power to defeat any criminal prosecution instituted by the Government, and to annul as unconstitutional, attempts by Congress to reach a defendant's specified conduct through the use of the criminal machinery. Over and over, this theme is repeated in the debates on the bill, dominating every other topic of discussion except the concern for safeguarding the defendant's privilege against double jeopardy. As THE CHIEF JUSTICE's opinion details, it is difficult to imagine a case more closely fitting the type of case in which Congress intended to allow an appeal than the instant one.

The majority suggests that we must remember that the Act was "a compromise," and that Congress was very concerned about not unduly encroaching on the rights of the defendant. But the "compromise" between the House and the Senate was only over the areas in which to allow appeal—there was complete accord that constitutional cases of this sort constituted one of those

areas; they were indeed the Act's *raison d'être*. Similarly while Congress was concerned to protect the defendant's rights, it had no doubt that those rights were not invaded where a defendant had been found guilty, and the Government appealed the judge's decision that for legal reasons the verdict could not stand. The majority, in short, pays lip service to the policy of the Act without ever applying those policies to the question presented in the case before it. Judge Wyzanski, anxious to do his duty as he saw it, and yet aware that ultimate resolution of the constitutional issue properly belongs in this Court, had two means of passing on the issue while still protecting Sisson's rights: he could have granted Sisson's motion after a pretrial hearing, see *United States v. Covington*, 395 U. S. 57, 60; Fed. Rule Crim. Proc. 12(b)(1), 12(b)(4), or he could, as here, grant the motion only after the jury's verdict of guilty forced him to reach the constitutional question. In either case, none of the interests reflected in the jeopardy provisions of the Constitution—protecting defendants from repeated and harassing trials for the same offense—is in any way endangered. In fact, Sisson's interests if anything are less in jeopardy in the second case than the first where the Government's appeal would force a long delay in beginning the trial itself.

The conclusion that Congress intended judgments of this kind to be reviewed seems to me so clear, that I suspect the majority's neglect of this aspect of the statute amounts to a tacit admission that policy and purpose point overwhelmingly toward finding jurisdiction. If that is the case, then to hang Congress on the technical meaning of the obscure legal terms it happened to use is not only inappropriate, but is strangely out of line with decisions which leap over the plain meaning of words in other contexts to reach conclusions claimed to be consistent with an Act's broader purposes. See



*Welsh v. United States*, — U. S. —; *Boy's Markets, Inc. v. Retail Clerk's Union*, — U. S. —; *Toussie v. United States*, — U. S. —; *United States v. Seeger*, 380 U. S. 163. Compared to some of these examples of "statutory construction," it is child's play to conclude that Congress did not really mean to limit "motion in arrest" to its old common-law meaning, or that at least if it did, it thought decisions such as Judge Wyzanski's would have been appealable under some other provision, such as the "motion in bar" as long as there was no danger of encroaching on the defendant's jeopardy interests.

Admittedly, the issues raised by Sisson are difficult and far-reaching ones, but they should be faced and decided. It is, to be sure, much more comfortable to be able to control the decision whether or not to hear a difficult issue by the use of our discretion to grant certiorari. But that is no excuse for ignoring Congress' clear intent that the Court was to have no choice in deciding whether to hear the issue in a case such as this. The fear expressed in the prevailing opinion that if we accept jurisdiction we shall be "cast adrift" to flounder helplessly, see *ante*, at 29, has a flavor of nothing so much as the long discarded philosophy that inspired the old forms of action and that led to the solemn admonition in 1726 that "[w]e must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion." *Reynolds v. Clarke*, 93 Eng. Rep. 747, 748 (K. B. 1726). I cannot agree. I would find jurisdiction.